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Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

ALEXANDRA SIMOTAS, M.D.,
Petitioner,

v.

KELSEY-SEYBOLD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI.

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April 3, 2007

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QUESTIONS PRESENTED

1. Does the opinion of the Fifth Circuit Court of Appeals opinion conflict with the reasoning and interpretation of the First Circuit Court of Appeals because the Fifth Circuit decided that it was irrelevant when Petitioner felt the effects of the adverse employment decision?

2. Does the opinion of the Fifth Circuit Court of Appeals fly in the face of the plain meaning of the statute?

3. Does the opinion of the Fifth Circuit Court of Appeals conflict with *Delaware State College v. Ricks,* 449 U.S. 250 (1980) and *Hitt v. Connell,* 301 F.3d 240 (5th Cir. 2002) because the Court of Appeals found that Petitioner's cause of action accrued on September 12, 2006, one of the 11 different days that have been used as her termination date because Petitioner received notice of termination that day though an actionable injury or an adverse action had not yet occurred?

4. Does the opinion of the Fifth Circuit Court of Appeals conflict with *Walters v. Metropolitan Educ. Enters.* 519 U.S. 202 (1997); *Community for Creative Non-Violence v. Reid,* 490 U.S. 730 (1989) by incorrectly determining the last discriminatory act and affirming a lower court finding of fact?

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CITATIONS OF OPINIONS AND ORDERS

The unpublished *per curiam* opinion and judgment of the United States Court of Appeals for the Fifth Circuit in *Alexandra Simotas, M.D. v. Kelsey-Seybold* (C.A. 06-20049) decided December 6, 2006, affirming the District Court's granting of Respondent's Kelsey-Seybold's motion for summary judgment and denying the Petitioner Alexandra Simotas' motion for reconsideration is set forth in the Appendix hereto (App. 3a and 10a).

The unpublished Memorandum Opinion of the United States District Court for the Southern District of Texas, Houston Division, in *Alexandra Simotas v. Kelsey-Seybold* (Civil Action No. 04-3549), decided November 30, 2005 granting Respondent's motion for summary judgment is set forth in the Appendix hereto (App. 13a and 17a).

The unpublished order of the United States District Court for the Southern District of Texas, Houston Division in *Alexandra Simotas v. Kelsey-Seybold* (Civil Action No. 06-20049), entered January 4, 2006, denying Petitioner's motion for reconsideration is set forth in the Appendix hereto (App. 10a).

The order by the Fifth Circuit denying the petition for rehearing dated January 3, 2007 is set forth in the Appendix hereto (App. 1a).

BASIS FOR JURISDICTION IN THIS COURT

The decision of the United States Court of Appeals for the Fifth Circuit affirming the District Court's order denying Petitioner's Motion for Reconsideration and affirming the

granting of Respondent's Motion for Summary Judgment was entered on December 6, 2006; and its order denying the Petitioner's timely filed petition for rehearing was filed on January 3, 2007. (App. 1a).

This petition for writ of certiorari is timely filed within ninety (90) days of the date the Court of Appeals denied petitioner's timely filed petition for rehearing. 28 U.S.C. § 2101(c); Revised Supreme Court Rule 13.3.

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISIONS IMPLICATED BY THIS PETITION

> (a) General rule. – No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms conditions and privileges of employment.

42 U.S.C § 12112(a).

STATEMENT OF THE CASE

Simotas is a physician who began employment with Kelsey-Seybold on March 15, 1999 in their Obstetrics/Gynecology department. During her employment, Kelsey-Seybold assigned Simotas to work with other resident-physicians in the department. This alarmed Simotas, as she

only had three years of medical experience outside of residency, and felt that in order to ensure the safety of her patients she needed the additional guidance gained from working alongside more experienced physicians. Accordingly, Simotas reported the situation and her concerns to her supervisors.

After learning of Simotas' concerns, her supervisors concluded that she was suffering from depression and needed to take medical leave from work. On or around May 3, 2002, Simotas took leave pursuant to the recommendation of her supervisors.

After going on medical leave, Kelsey-Seybold sent Simotas a "separation agreement." In that agreement, Kelsey-Seybold stated that Simotas was to be terminated and her last working day would be May 15, 2002. While the document was signed by Kelsey-Seybold, it was not signed by Simotas and did not constitute her discharge. Irrespective, an email exchange later took place between members of Kelsey-Seybold management stating, "Dr. Simotas [is terminated as of] 5/16/02, but don't send notice quite yet – let's wait until early next week."

Dr. James Hoyle, Medical Director for Kelsey-Seybold, sent out a notice informing "all providers" that Simotas had submitted her resignation as of May 23, 2002. However, Simotas had not expressed any interest towards resigning, much less submitted a formal resignation. Simotas did not perform any services for Kelsey-Seybold after mid-May 2002.

Shortly thereafter, Simotas received a letter from Cigna, Kelsey-Seybold's health insurance provider, stating that she had been terminated from Kelsey-Seybold as of May 31, 2002. Then, St. Luke's Episcopal Hospital, an affiliate of

Kelsey-Seybold, contacted Simotas and informed her that, as of June 10, 2002, she was no longer associated with Kelsey-Seybold.

While not entirely clear as to the date of Simotas' termination, the foregoing events clearly seem to indicate that—at some point, at least in house—she was terminated. However, on August 16, 2002, a form was completed and signed by the Kelsey-Seybold's human resources department, stating that Simotas had not been terminated in May 2002 but retroactively was to be placed on "leave status," and not to be classified as "terminated." (App. 21a.). This indicates that, according to Respondent, Simotas was terminated in May in their system but approximately three months later they "un"terminated her. (App. 21a.).

Thereafter, the human resource's department issued a document stating that as of September 10, 2002, Simotas was terminated. However, the document was not signed or approved until September 11, 2002. Further, the document classified Simotas as "TEMPPEND - Term Pending Final Check," meaning that the date of Simotas' actual termination was pending upon payment of her final paycheck. Kelsey-Seybold then sent a letter to Simotas, stating that she was terminated, but she would continue to receive her salary for 30 days. Kelsey-Seybold sent this letter to the wrong address and Simotas did not receive the letter. Kelsey-Seybold was fully aware of Simotas' correct address, as indicated on the stub for her last 30 days salary.

In a letter written by counsel for Kelsey-Seybold to the Equal Employment Opportunity Commission, the company stated that Simotas was terminated on September 12, 2002 as opposed to their previous general position that she was terminated on September 10, 2002. Respondent's position was

further emphasized and corroborated in another, separate letter written to the EEOC from Kelsey-Seybold's counsel, stating, again, that Simotas' date of termination was September 12. However, in yet another letter dated September 12, 2002 written by counsel for Kelsey-Seybold to counsel for Simotas, the company stated that Simotas was terminated retroactively on September 10, 2002 but would receive 30 days pay. Most importantly, Simotas was going to be receiving pay and was on the payroll from 30 days from September 12, 2002. (App. 19a.)

Due to the patent ambiguity of the foregoing events and communications between Simotas, Kelsey-Seybold, and various representatives for Kelsey-Seybold, it became impossible for Simotas to determine the actual date of her termination. Since it had been indicated that Simotas was terminated on September 12th, but that she would continue to receive pay or be on the payroll for an additional 30 days thereafter, Simotas' last day of employment would be October 12, 2002. Yet, Kelsey-Seybold did not cut a check for Simotas for her last 30 days of employment until September 20th, extending the date she was on payroll to be October 20, 2002. As such, the 300-day limitations period for filing a charge of discrimination with the EEOC expired no earlier than October 12th, and possibly extended through October 20th. Accordingly, Simotas was within the 300-day filing period when she filed her charge with the EEOC on August 8, 2003.[1]

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[1] Kelsey Seybold is at least consistent in its pattern and practice of changing dates as they relate to Dr. Simotas. Additionally, though Plaintiff has shown this Court above that Defendant sent a communication on September 12, 2002, Defendant specifically denies sending such a communication in paragraph 4.3 of its Amended Original Answer filed in this case on March 7, 2005.

Plaintiff offers sworn evidence under oath that the last day of her employ with Defendant was October 12, 2002. The sworn EEOC charge wherein the EEOC requests the *latest* date discrimination took place [emphasis ours] indicating that the "latest date discrimination took place" was October 12, 2002. This is based on page two of Dr. Simotas' charge, paragraph 3 where she indicates that on "September 12, 2002, Kelsey-Seybold communicated to me that I would be fired. 30 days from September 12, 2002 is October 12, 2002 – and according to the EEOC form – the latest date discrimination took place. This is supported by notification from defense counsel Ms. Cavazos to Plaintiff's counsel and through letter dated September 12, 2002 that Dr. Simotas was to be **on payroll for 30 days** [emphasis ours] and that Defendant "will forward a check for 30 days pay, less legal deductions."

Kelsey Seybold argues that on August 8, 2003, 332 days after her termination of employment, Simotas filed a charge of discrimination with the EEOC. Rather, on August 8, 2003, 300 days after the last day she was on Kelsey Seybold's payroll (September 12, 2002 plus 30 days is October 12, 2002) Dr. Simotas timely filed her charge of discrimination.

District Court Judge Harmon determined that a fact issue did not exist as which date was the last discriminatory action. The District Court offered analysis benefit of any case law or

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Defendant states that according to the administrative file maintained by the EEOC, Simotas' charge of discrimination was prepared, faxed and filed by her attorneys on August 8, 2002. It is true that Plaintiff filed her charge on August 8, 2003; however, the documents Defendant provided and swore to be true from the EEOC erroneously indicate a filing date of August 18, 2002.

legal standard in its order denying Petitioner's Motion for Reconsideration.

Judge Harmon went on to determine that Simotas specifically raised questions of how to interpret facts, "yet held that no fact issue existed." Despite these raised questions of how to interpret facts, Judge Harmon interpreted facts and waded through the eleven proposed termination dates and chose a date of the latest discriminatory event herself. The District Court did not draw references in favor of Petitioner.

Judge Harmon held that Petitioner's Motion for Reconsideration was untimely filed, a proposition which the Court of Appeals for the Fifth Circuit ultimately disagreed.

REASONS FOR GRANTING THE WRIT

1. **The opinion of Court of Appeals of the Fifth Circuit conflicts with the reasoning and interpretation of the First Circuit Court of Appeals because the Fifth Circuit decided that it was irrelevant when Simotas felt the effects of the adverse decision.**

The First Circuit Court of Appeals declined to follow or extend *Ricks* and the lines of cases immediately following *Ricks,* including but not limited to *Chardon v. Fernandez,*[2] because there was no apparent tangible effects of the injury and the implications of the discriminatory acts were not crystallized.

The First Circuit has noted that that an overly expansive reading of *Ricks* may lead to problems of ripeness. *See*

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[2] 454 U.S. 6 (1981). (App. 23a).

Johnson v. General Electric, 840 F.2d132, 136 (1st Cir. 1988). The *Johnson* court went on to state that it is unwise to encourage lawsuits before the injuries occur resulting from the violations are delineated, or before it is even certain that the injuries will occur at all. *Id.* Actions that do not have any crystallized implications or apparent tangible effects do not trigger the statute of limitations. *Thomas v. Eastman Kodak Co.,* 183 F.3d 38, 55 (1st Cir. 1999). (App. 54a). In fact, they are not actionable at all. In *Fletcher v. Tufts University,* the plaintiff was a former employee of the university and eligible for disability benefits. 367 F. Supp. 2d 99 (D.Mass 2005). The court held, invoking *Thomas,* that plaintiff's statute did not begin to run when she was classified as having a mental condition or when she was given notice that her benefits would end but rather **when her benefits ended** [emphasis ours] as she would not have suffered an injury because she would not have been deprived of any benefits to which she would have been entitled. *Fletcher,* 367 F. Supp. at 99. Thus plaintiff was aware of her actionable injury on the date the benefits stopped that she was aware of the cause of the injury and it was on that date that the alleged discriminatory acts became apparent and crystallized. *Fletcher,* 367 F. Supp. 2d 99, 109. (citing *Thomas,* 183 F.3d at 55).

Accordingly, Simotas' cause of action accrued when her benefits (30 days or salary pay) ended and her injury was apparent and crystallized. Review is necessary to maintain uniformity and consistency among the Circuit Court's regarding this Court's opinions, particularly those interpreting *Ricks* and *Chardon.*

The First Circuit reasoning is appropriate and consistent with the definition of actionable injury and the plain meaning of the statute.

Justices Brennan and Marshall dissented in *Chardon,* opining that it is quite another thing to hold, as the Court did in *Chardon*, that a cause of action for damages resulting from an unconstitutional termination of employment accrues when the Plaintiff learns that he *will* be terminated. *Chardon,* 454 U.S. at 9. (App. 23a). Justices Brennan stated that to his knowledge such a rule has no analogue in customary principles of limitations law. *Id.*; *See 4 A.* Corbin, Contactors § 989 (1951). (App. 23a).

Petitioner had no concrete harm and had not suffered an adverse action until she was no longer on Respondent's payroll.

2. The opinion of the Fifth Circuit flies in the face of the plain meaning of the statute.

The Fifth Circuit opinion as to when the cause of action accrued or the statute of limitations begins to run is not within the plain meaning of the statute at hand. The first step for the Court in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent." *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 240(1989). The statue defines the action, which can be considered an actionable injury. The Fifth Circuit's holding that the beginning date for the limitations period is the day the employee learns of the challenged decision is contrary to the plain meaning of the statute. This statute is not ambiguous.

> (b) General rule. – No covered entity shall discriminate against a qualified individual with a disability because of the disability of such

> individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms conditions and privileges of employment.

42 U.S.C § 12112(a).

This Court should not depart from the plain meaning of the statute.

The actionable injury in the instant case is the termination or discharge of the Plaintiff, not her notice of termination or discharge. "Notice" of termination of her employment relationship or the decision to terminate is clearly and unambiguously **not** listed as a mechanism for discriminating and is not an actionable injury or adverse action under the statute. The notice is not a ripe adverse action or an adverse action at all under the law. The Fifth Circuit opinion in the instant matter and particularly in the instant matter - as eleven very different dates exist as to when Defendant "terminated" Plaintiff (even on one occasion terminated her in their human resources software and months later "un" terminated her) - lead to those very problems of ripeness. The opinion of the Fifth Circuit stands for the premise of encouraging lawsuits before the injuries or violations occur and is *contra* to the statute.

While a provision exists for statutes to be tolled or modified those provisions exist when facts are concealed or the injured is mislead. However, those situations always involve the injured obtaining knowledge **after** the injury as opposed to before. *Rhodes v. Guiberson Oil Tools Division,* 927 F.2d 876 (5th Cir. 1991). This is similar to a patient finding out his doctor left a sponge in during surgery. The

scienter is after the action. In the instant case, the Court wants us to have knowledge of the actionable injury or adverse action **before it** actually occurs. Petitioner, and in the very good company of Justice Brennan, can think of no other circumstance where the statute begins to run before the actionable injury occurs. This simply isn't good law.

3. **The opinion of the Fifth Circuit Court of Appeals conflicts with *Delaware State College v. Ricks,* 449 U.S. 250 (1980) and *Hitt v. Connell,* 301 F.3d 240 (5th Cir. 2002) because the Court of Appeals found that Simotas' cause of action accrued on September 12, 2006, one of the 11 different days that have been used as her termination date because Simotas received notice of termination that day though an actionable injury or an adverse action did not occur.**

The trial court committed error by making a factual interpretation of when Plaintiff's ADA claims accrued. The Fifth Circuit opinion in this case conflicts with existing Fifth Circuit precedent because the decision is based on the premise that the relevant date for the limitations period is the day the employee learns the decision has been made. An actionable injury is required for a statute to run, not even a proposed notice constitutes an actionable injury such as an adverse action.

In *Hitt,* the Fifth Circuit Court of Appeals found that it was not Hitt's perception of a threat to his job, his fear of being fired or even the proposed notice of firing that constituted an actionable *injury*. *Hitt v. Connell,* 301 F.3d 240 (5th Cir.2002). (App. 32a). In this context, the injury is unlawful retaliation resulting in an "adverse employment action," such as discharge, demotion or formal reprimand.

Hitt v. Connell, 301 F.3d 240 (5th Cir. 2002); *See Breaux v. City of Garland,* 205 F.3d 150, 157-58 (5th Cir. 2000). The Court in *Hitt*[3] opined that the Appellant's (Connell's) argument rested on a misreading of the Supreme Court decision in *Delaware State College v. Ricks*. 301 F.3d at 246. The Court went on to hold:

> In *Ricks,* the plaintiff alleged that the college unlawfully discriminated against him when it denied him tenure. After denying him tenure, however, the college offered Ricks a "terminal" employment contract; both parties understood that Ricks had to leave at the end of the year. The Supreme Court held that the statute of limitations began to run when the college reached a final decision denying tenure, rather than when Rick's employment ultimately ceased. The result hinged on the fact that Ricks complained about a single adverse employment action: the denial of tenure. As the Court clearly explained, **"If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment. But the complaint alleges no such facts"**
>
> *Hitt,* 301 F.3d at 246, (citing *Ricks,* 449 U.S. at 255-258.) (App. 32a).

In other words, the only adverse action Ricks complained of was the denial of tenure. Ricks did not complain of his termination or discharge. If he had complained of his termination, like Petitioner did, his cause of action would

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[3] The opinion was authored by the Honorable Edith Jones.

have accrued at the time of his actual termination of employment. It is important to note that the Supreme Court uses the words "actual termination of employment" [emphasis ours] as opposed to "notice of." *Ricks,* 449 U.S. 258. Simotas' actual employment relationship ended on October 21, 2006 as she was on Respondent's payroll until that time. The end of the actual employment relationship is the discriminatory discharge of which Petitioner complains.

The Court of Appeals went on to incorrectly hold that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination. Opinion, page 4 at Appendix 1a. (citing *Ricks,* 449 U.S. at 257.) This premise is simply wrong and inapplicable to the case at bar. That reasoning was discussed in *Ricks,* only because he failed to complain about his termination as an adverse action and was trying to boot strap onto his denial of tenure complaint. The argument regarding continuity of employment does not apply here because Simotas **did** complain about her termination as the adverse action just as the Fifth Circuit opined in *Hitt.* 301 F.3d at 246, (citing *Ricks,* 449 U.S. at 255-258.) (App. 32a)

The Court of Appeal's opinion of the Fifth Circuit is inconsistent with Supreme Court and existing Fifth Circuit precedent.[4]

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[4] The June 2006 Supreme Court decision expanding the definition of adverse action boosts Simotas' position by stating that the anti-retaliation provision covers only those employer actions that would have been materially adverse to a reasonable employee. *Burlington Northern v. White,* 126 S.Ct. 2405 (June 22, 2006). The case does not discuss notice as materially adverse.

4. The opinion of the Fifth Circuit conflicts with *Walters v. Metropolitan Educ. Enters.*, 519 U.S. 202 (1997); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) by incorrectly determining the date of the latest discriminatory act and affirming a lower court finding of fact.

The standard the district court did use, and the Fifth Circuit affirmed, and which was bereft of any legal authority at all, and which stated that Simotas did not perform any services for Defendant after a September 12, 2002 date is incorrect in law and in fact. Simotas had been on leave for five months, **had not performed services during that time and was indeed an employee of Defendant**. The correct standard to determine when an employment relationship ends is the Supreme Court precedent setting forth that person is an employee is whether that employee is on the payroll and the tax subsequent treatment of the employee. *Walters v. Metropolitan Educ. Enters.*, 519 U.S. 202, 206, 117 S.Ct. 660, 663 (1997); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52, 109 S.Ct. 2166, 2178-79 (1989).

On September 20, 2006, 8 days after the district court determined was the last discriminatory event, Respondent gave Simotas a paycheck for "30 days pay" replete with deductions. Simotas remained on the payroll and a remained an employee, for the next 30 days. The employment relationship did not end until after October 20, 2002, which is the day before the statute began to run. Accordingly, Simotas would be off the payroll on October 21, 2002.

The Fifth Circuit and Judge Harmon erred in determining there was not a fact issue as to the last date of discrimination for purposes of statute of limitations which in itself is a

conflict with Fifth Circuit precedent. In fact, determining which date is the last discriminatory act is itself a fact issue. *United States v. Georgia Power Co.*, 474 F.2d 906, 923-24 (5th Cir. 1973); s*ee Bano v. Union Carbide Corp.*, 361 F.3d 696, 712 (2nd Cir. 2004). Judge Harmon determined that "Simotas specifically raised questions of how to interpret facts." The Fifth Circuit ignored this blatant inconsistency with precedent.

In the District Court's order granting summary judgment, the Court concludes "[t]he employment relationship ended no later than September 12, 2002." However, as shown above, there is a material dispute between the litigants concerning the date representing the end of the employment relationship. Simotas consistently took the position that the employment relationship ended no sooner than October 12, 2002, and possibly extended as far as October 20, 2002. In support of this position, Simotas has offered her sworn testimony that she believed in good faith the last date of discrimination was October 12, 2002. Further, she has produced a paycheck that she received on September 20, 2002, representing 30 days pay, indicating her employment was extended through October 20, 2002 (i.e. 30 days from the receipt of the check).

The District Court's order denying the Motion for Reconsideration is two pages and two lines long. The only authority contained in the order is Federal rule related to the court's incorrect proposition that Simotas untimely filed her motion.

The District Court's mischaracterization of dates, and engagement as a fact finder on what was the last discriminatory act is a question of fact for the trial court. *EEOC v. Griffin Wheel Company,* 511 F.2d 456 (5th Cir. 1975).

In the District Court's order granting summary judgment, the Court concludes "[t]he employment relationship ended no later than September 12, 2002." Despite that incorrect finding of fact, a material dispute exists between the litigants concerning the date representing the end of the employment relationship.

The District Court states that "[n]o evidence suggests that Simotas ha[d] the right to exchange labor for money with Kelsey-Seybold after September 12, 2002." In fact, Simotas did not exchange labor for money after mid-May 2002 through her ultimate or "real" termination in October 2002. However, the Court failed to explain how Simotas was an employee from May through September though she had not performed services at that time.[5] Eleven dates exist as to when Respondent terminated Simotas. Kelsey-Seybold had, in their files, terminated Simotas from May 15, 2002 to August 16, 2003 and retroactively re-instated her on their payroll as an employee though she, Simotas, had not exchanged labor for services or under the District Court's respectfully misguided position that she had no right to perform services.

The circumstances surrounding Simotas' discharge, coupled with the mixed official signals conveyed to her by Kelsey-Seybold and its various affiliates, are collectively sufficient to cast doubt upon whether a reasonable employee in Simotas' position should have known of the exact date she had been discharged. *See Clark v. Resistoflex Co.*, 854 F.2d 762, 766 (5th Cir. 1988). The record contains undisputed evidence that Simotas received several different statements indicating the date of her termination, none being any more

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[5] An employee on ununpaid leave is still an employee. *DeVito v. Chicago Park Dist.* 83 F.3d 878, 880 (7th Cir. 1996).

persuasive or authoritative then another. Yet, the relevant inquiry is not merely on the subjective state of mind of the plaintiff, but also on the sufficiency of the notice Simotas received and when an actionable injury occurred. *See id.* While Kelsey-Seybold argues that Simotas received notice on September 10th, it hardly can be said that such notice was any more sufficient than the October 20th termination date. This creates an undeniable fact issue on the date of Simotas' termination.

CONCLUSION

For all of the reasons identified herein, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit and, ultimately, the vacate the judgment below and remand the cause to the District Court for the Southern District of Texas, Houston Division, for further proceedings and a trial on the merits of Simotas' claims or provide the Petitioner such other relief as is far and just in the circumstances.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20049

[Filed January 3, 2007]

MD ALEXANDRA SIMOTAS Plaintiff-Appellant,	))
v.	)
KELSEY-SEYBOLD, Defendant-Appellee.	))

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before JONES, KING, and, DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20049

[Filed December 6, 2006]

ALEXANDRA SIMOTAS, M.D., Plaintiff-Appellant,	)
versus	)
KELSEY-SEYBOLD, Defendant-Appellee.	)

Before JONES, Chief Judge, and KING and DAVIS, Circuit Judges.

OPINION

PER CURIAM:*

Dr. Alexandra Simotas appeals the district court's grant of summary judgment on her ADA claim against her former

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

employer. As the claim is time-barred, the district court's ruling is AFFIRMED.

I. BACKGROUND

Simotas previously was employed as a physician by Kelsey-Seybold Medical Group, P.A. ("Kelsey-Seybold") in Houston, Texas. On September 10, 2002, after Simotas had been on leave for several months, Kelsey-Seybold sent a letter informing her that her leave had expired as she was "terminated effective today . . . without notice and with thirty (30) days [sic] pay." Simotas received the letter on September 12, 2002. Also on September 12, Kelsey-Seybold notified Simotas's attorneys of the discharge.

On August 8, 2003, 332 days after her termination, Simotas submitted a charge of discrimination to the Equal Employment Opportunity Commission ("EEOC"). The EEOC dismissed the charge as untimely and issued a notice of right to sue. Simotas filed this lawsuit, asserting a violation of the Americans with Disabilities Act ("ADA") in the Southern District of Texas. The district court granted Kelsey-Seybold's motion for summary judgment on November 30, 2005. Simotas filed a motion for reconsideration, which the district court denied. This appeal followed.

II. DISCUSSION

A. Summary Judgment

We review a district court's grant of summary judgment *de novo*, applying the same standards as the trial court. *MacLachlan v. ExxonMobil Corp.*, 350 F.3d 472, 478 (5th Cir. 2003). A court should grant summary judgment when "the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). Facts are material only if they "might affect the outcome of the suit under the governing law . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

The ADA incorporates the enforcement procedures of Title VII of the Civil Rights Act of 1964, set forth in 42 U.S.C. § 2000e-5. *See* 42 U.S.C. § 12117. Before pursuing a claim, a plaintiff must file a timely charge of discrimination with the EEOC. *Dao v. Auchan Hypermarket*, 96 F.3d 787, 788-89 (5th Cir. 1996) (per curiam). In a "deferral state" such as Texas, the charge must be filed within 300 days. 42 U.S.C. § 2000e-5(e)(1); *Tyler v. Union Oil Co. of Cal.*, 304 F.3d 379, 384 (5th Cir. 2002).

The discriminatory act of which Simotas complains is the termination of employment. Simotas admitted receiving the letter informing her of the termination on September 12, 2002, and her counsel received notice that same day. Simotas did not file her EEOC charge until August 8, 2003, well over 300 days later.

The fact that she received thirty days' pay with her termination does not extend the filing period. The relevant date for determining the beginning date for the limitations period is the day the employee learns that the challenged decision has been made, not when she feels the effects of that decision. *See Chardon v. Fernandez*, 454 U.S. 6, 8, 102 S. Ct. 28, 29, 70 L. Ed. 2d 6 (1981) (per curiam) (statute of limitations began to run when plaintiffs learned of the decision to terminate, not when their appointments ended); *Del. State*

Coll. v. Ricks, 449 U.S. 250, 257-59, 101 S. Ct. 498, 504, 66 L. Ed. 2d 431 (1980) (limitations period began to run when plaintiff was notified of the denial of tenure, not on the date his employment ended); *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878 (5th Cir. 1991) ("filing period begins when the employee receives notice of discharge."). Even if the payment extended her employment, "mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Ricks*, 449 U.S. at 257, 101 S. Ct. at 504.[1]

For the first time on appeal, Simotas argues that the limitations period should be equitably modified. Arguments not made before the district court are waived and will not be considered on appeal. *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 601 (5th Cir. 2005). Moreover, Simotas can point to no recognized basis for equitable modification, nor can she put forth evidence to justify a modification. As Simotas has the burden of proving any grounds for equitable modification, her claim must fail. *See Rhodes*, 927 F.2d at 879.

B. Attorneys' Fees

Kelsey-Seybold moves for attorneys' fees under either Federal Rule of Appellate Procedure 38 or 42 U.S.C. § 2000e-5(k), which is incorporated into the ADA by 42

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[1] Simotas also contends, and Appellee agrees, that the court mistakenly held her motion for reconsideration to be untimely. Even if true, this error was harmless, as Simotas failed to explain why her affidavit was not filed in conjunction with initial consideration of summary judgment, and the affidavit even if considered, does not dispute that her attorneys were informed on September 12 of her termination. *See In re Cueva*, 371 F.3d 232, 234 (5th Cir. 2004).

U.S.C. § 12117. While Simotas presents a fundamentally incorrect understanding of the law, we decline to say that her claims were "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S. Ct. 694, 700, 54 L. Ed. 2d 648 (1978). Additionally, a portion of the appeal sprang from the district court's error in calculating the applicable time limitation regarding the motion for reconsideration. Although we affirm the judgment of the district court, the appeal was not entirely frivolous.

III. CONCLUSION

The district court properly dismissed Simotas's employment discrimination action as time barred.

Its judgment is **AFFIRMED**.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20049
D.C. Docket No. 4:04-cv-3549

[Filed December 6, 2006]

MD ALEXANDRA SIMOTAS Plaintiff-Appellant,	)
v.	)
KELSEY-SEYBOLD, Defendant-Appellee.	)

Appeal from the United States District Court for the Southern District of Texas, Houston.

Before JONES, Chief Judge, and KING and DAVIS, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: Jan 11 2007

A True Copy Attest

Clerk, U.S. Court of Appeals Fifth Circuit
By: /s/_____
Deputy
New Orleans, Louisiana Jan 11 2007

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-04-3549

[Filed January 4, 2006]

ALEXANDRA SIMOTAS,	)
Plaintiff,	)
	)
VS.	)
	)
KELSEY-SEYBOLD,	)
Defendant.	)
	)

ORDER DENYING MOTION FOR RECONSIDERATION

Before the court is a motion for reconsideration brought by the Plaintiff, Alexandra Simotas (Simotas). Doc. 30. The Defendant, Kelsey-Seybold, responded. Doc. 31.

The motion for reconsideration is DENIED. Doc. 30.

BACKGROUND

Kelsey-Seybold terminated Simotas through a letter dated September 10, 2002 and received September 12, 2002. That

letter read, in part, "your employment is terminated, effective today... with thirty (30) days pay."

On November 30, 2005, the court entered a memorandum and order granting Kelsey-Seybold's motion for summary judgment. Doc. 28. Simotas filed her motion for reconsideration on December 14, 2005.

LEGAL ANALYSIS

A litigant must file a motion for reconsideration in a timely manner. "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). '"Judgment' as used in these rules includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). Simotas asks the court to alter its order entered November 30, 2005, i.e., the order granting the motion for summary judgment. She filed her motion more than ten days after the order granting the motion for summary judgment was entered. Therefore, this court has no ability to entertain her motion. Fed. R. Civ. P. 59(e).

Furthermore, no question of material fact exists. The arguments that Simotas advances do not raise disputes of *fact*. Instead, they raise questions of how to *interpret* facts. Both parties agree that Simotas received a stating that her employment was terminated "effective today ... with thirty days pay." They also agree that the letter was dated September 10, 2002. There is no evidence that Simotas received the letter after September 12, 2002. The parties dispute only when Simotas ceased to be an employee of Kelsey-Seybold, an issue dispute raises a question of how to interpret the legal effect of the letter, but does not raise any factual disputes.

Kelsey-Seybold terminated Simotas' employment, "effective today." The phrase "effective today" cannot mean that Simotas was terminated September 20, 2002 or on October 12, 2002 as neither of those dates could reasonably be considered "today" as the term was used in a letter dated September 10, 2002 and received on September 12, 2002.

In fact, Simotas does not appear to dispute the meaning of "effective today." Instead, she identifies another portion of the sentence as contradicting the first part of the sentence. Specifically, she believes that "with thirty days pay" some how extended her employment beyond the date referenced as "today." It did not. The first part of the sentence, "effective today" described how long the employment relationship would continue. "Thirty days pay" described the terms on which it would end. "Thirty days" pay is merely a method of denominating the amount of money that Simotas would receive. Kelsey-Seybold could have denominated the same amount of money in an absolute dollar figure without changing the meaning of the sentence.

Because Simotas, the Plaintiff, did not file a motion for reconsideration in a timely fashion, her motion is DENIED. Doc. 30.

SIGNED at Houston, Texas, this 4th day of January, 2006

/s/
Melinda Harmon
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-04-3549

[Filed November 30, 2005]

ALEXANDRA SIMOTAS	)
Plaintiff	)
	)
v.	)
	)
KELSEY-SEYBOLD	)
Defendant	)
	)

MEMORANDUM AND ORDER

The Defendant's Motion for Summary Judgment is GRANTED. Doc. 16.

BACKGROUND

Both parties agree that:

(1) No later than September 12, 2002, the Plaintiff, Alexandra Simotas (Simotas) received a letter from the Defendant, Kelsey-Seybold. The letter read, in part, "Your employment

is terminated, effective today... with thirty (30) days pay." Doc. 16, Exh. 3.

(2) Kelsey-Seybold did not employ Simotas at any time after September 12, 2002.

(3) Simotas filed a charge of discrimination with the Equal Opportunity Employment Commission ("EEOC") on August 8, 2003, more than 300 days after September 12, 2002.

LEGAL STANDARDS

A party seeking summary judgment must identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, showing that no genuine issue of material fact exists and explain why it is is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). If the moving party demonstrates both an absence of a material fact and an entitlement to judgment as a matter of law, then the party opposing the motion for summary judgment bears the burden of setting forth specific facts and competent summary judgment evidence that raise a genuine issue of material fact on each essential element of any claim on which he bears the burden of proof at trial. Fed. R.Civ. P. 56(c). The non-moving party may not rest on mere allegations or denials in its pleadings, but must produce affirmative evidence and specific facts demonstrating the existence of a genuine issue for trial. Fed. R.Civ. P. 56(e); *Anderson v. Liberty Lobby,* 477 U.S. 248, 256-57 (1986). The non-moving party need not present its own evidence, but may identify genuine issues of fact raised by the evidence produced by the moving party to survive summary judgment. *Isquith v. Middle South Utilities, Inc.,* 847 F.2d 186, 198-200 (5th Cir. 1988).

Simotas alleges that Kelsey-Seybold violated the Americans with Disabilities Act (42 U.S.C. § 12101, et seq., "ADA"). Claims under the ADA must be filed with the EEOC within 300 days after the "alleged unlawful practice occurred" pursuant to 42 U.S.C. § 2000e-5, otherwise, they are time-barred. See, 42 U.S.C. § 12117; *Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1988); and *Stith v. Perot Systems Corp.*, 2004 WL 690884 (N.D. Tex. 2004).

ANALYSIS

In this case, the "alleged unlawful practice" was the termination of the employment relationship between Simotas and Kelsey-Seybold. The employment relationship ended no later than September 12, 2002. No evidence suggests that Kelsey-Seybold asked Simotas to perform any services for it after September 12, 2002. Likewise, no evidence suggests that Simotas attempted to perfoml any services after September 12, 2002. No evidence suggests that Simotas has the right to exchange labor for money with Kelsey-Seybold after September 12, 2002.

Simotas argues that she was "on the payroll" for thirty days after September 12, 2002 because she received thirty days pay, rather than thirty days of severance pay. However, the fact that Simotas received thirty days of pay is immaterial because the "alleged unlawful practice" was not the act of paying money to Simotas. Simotas did not explain how ADA prohibited, or even regulated, the choice Kelsey-Seybold made to structure its last payment to her. Moreover, whether Simotas was "on the payroll" is similarly irrelevant because Simotas had no right to return to work after September 12, 2002 whether she was "on the payroll" or not.

In summary, Simotas presented no admissible evidence suggesting that "effective today" meant anything other than what the words appear to mean: Kelsey-Seybold committed the "alleged unlawful practice" more than 300 days before Simotas filed her charge of discrimination.

Accordingly the Defendant's Motion for Summary Judgment is GRANTED. Doc. 16.

SIGNED at Houston, Texas, this 29th day of November, 2005.

/s/
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-04-3549

[Filed November 30, 2005]

ALEXANDRA SIMOTAS, Plaintiff,	)
vs.	)
KELSEY-SEYBOLD, Defendant.	)

FINAL JUDGMENT

On this day, November 30, 2005, in the action pending between Plaintiff, Alexandra Simotas, and Defendant, Kelsey-Seybold, lhe court issued its Opinion on Summary Judgment that Plaintiff's claims must be dismissed, and the court hereby

ORDERS that Plaintiff, Alexandra Simotas, take nothing, and that Defendant, Kelsey-Seybold, is awarded its costs.

SIGNED at Houston, Texas, this 30th day of November, 2005.

/s/
Melinda Harmon
United States District Judge

APPENDIX G

THOMPSON & KNIGHT LLP
ATTORNEYS AND COUNSELORS

THREE ALLEN CENTER
333 CLAY STREET SUITE 3300
HOUSTON, TEXAS 77022-4499
(713)854-8111 FAX (713) 654-1871
www.tklaw.com

September 12, 2002

Via Facsimile 713 621-6670
And Regular Mail

Ellen Sprovach, Esq.
Gregg M. Rosenberg & Associates
11 Greenway Plaza, Suite 2810
Houston, TX 77046

Re: *Alexandra Simotas, M.D./Kelsey-Seybold MedicalGroup, P.A. ("Kelsy-Seybold")*

Dear: Ms. Sprovach:

Kelsey-Seybold rejects Dr. Simotas' offer to settle her claims for the payment of five months severance. As you know, on Friday, May 3, 2002, Dr. Simotas met with Dr. James Hoyle, Kelsey's Medical Director of Clinical Operations; Dr. Fran Smith, Department Chief of Obstetrics;

and Susan Moore, Director of Human Resources. Dr. Hoyle informed Dr. Simotas of certain concerns including performance and quality of care issues that would need to be addressed through the peer review process.

Dr. Hoyle discussed an alternative if Dr. Simotas wanted to resign and be paid severance. Instead, Dr. Simotas requested to be placed on leave, and she was placed on leave without pay. Dr. Simotas has now been on leqave status for just over four months. Her leave has expired, and I have been advised that her employment has been terminated by Kelsey-Seybold without notice and with thirty (30) days pay, effective September 10, 2002. By separate letter, Kelsey-Seybold has advised Dr. Simotas of her termination of employment and will forward a check for 30 days pay, less legal deductions.

On another note, you sent me a letter, advising that it was your understanding that Kelsey-Seybold had cancelled Dr. Simotas' health insurance. If Dr. Simotas' health insurance was cancelled inadvertently, it has been reinstated. In connection with her termination of employment, Dr. Simotas will receive a separate letter, advising her of her right to elect health insurance continuation.

Yours very truly,

/s/ Roxella T. Cavazos
Roxella T. Cavazos

APPENDIX H

Kelsey-Seybold Clinic

HUMAN RESOURCES ACTION FORM

Employee Identification Information

Name (Last, First, MI)	Employee #
Alexandra Simotas	11867

Termination *(2 reason codes and Term/Final status code required)*

Status Code	Term/Final Status
T1	

Miscellaneous Change
Effective Date
05/15/02

Comments: Change Employee to L9 status (no pay, no benefits).

APPROVALS

Initiative Supervisor/Manager Date

Manager/Director Date

Vice President/CAO Date

s/SM 8/16/02
Human Resources Date

Data Entry Initials: SB
6/18/02

RETURN TO HUMAN RESOURCES

[USCA5 420]
[PLAINTIFF'S EXHIBIT 9]

APPENDIX I

454 U.S. 6, 102 S.Ct. 28, 27 Fair Empl. Prac. Cas.(BNA) 57, 27 Empl. Prac. Dec. P 32,205, 70 L.Ed.2d 6 (1981)

SUPREME COURT OF THE UNITED STATES

No. 81-249

[Filed November 2, 1981]

CHARDON, SECRETARY OF PUBLIC EDUCATION OF PUERTO RICO, ET AL.

v.

FERNANDEZ ET AL.*

* Together with Chardon, Secretary of Public Education of Puerto Rico, et al. v. Rodriguez; Chardon, Secretary of Public Education of Puerto Rico, et al. v. Santiago de Orta; Chardon, Secretary of Public Education of Puerto Rico, et al. v. Angiuta de Rios; Chardon, Secretary of Public Education of Puerto Rico, et al. v. Sanchez; Chardon, Secretary of Public Education of Puerto Rico, et al. v. Santana; Chardon, Secretary of Public Education of Puerto Rico, et al. v. Perez-Ramirez; Chardon, Secretary of Public Education of Puerto Rico, et al. v. Roman de Molina; Chardon, Secretary of Public Education of Puerto Rico, et al. v. Collazo; Chardon, Secretary of Public Education of Puerto Rico, et al. y. Garcia; Chardon, Secretary of Public Education of Puerto Rico, et al. v. Lopez de Ferra; Chardon, Secretary of Public Education of Puerto Rico, et al. v. Beltran; Chardon, Secretary of Public

In a suit by terminated nontenured administrators in the Puerto Rico Department of Education, under the 1871 civil rights statute, a dismissal was granted by the United States District Court for the District of Puerto Rico, but the Court of Appeals, First Circuit, reversed 648 F.2d 765. The Supreme Court held that applicable limitations period began to run when notice of termination was given, allegedly on political grounds, and not on date when employment terminated, there being no allegation of illegal acts committed subsequent on date on which decisions to terminate were made.

Reversed and remanded.

Justice Brennan dissented and filed opinion in which Justice Marshall joined.

Justice Stevens dissented and filed opinion in which Justice Brennan and Justice Marshall joined.

OPINION

[*6] [**28] PER CURIAM.

Respondents were nontenured administrators in the Puerto Rico Department of Education during the 1976-1977 [*7] school year.[1] On dates prior to June 18, 1977, each

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Education of Puerto Rico, et al. v. Cacho de Freytes; and Chardon, Secretary of Public Education of Puerto Rico, et al. v. Navarro, also on petition for certiorari to the same court (*see* this Court's Rule 19.4).

[1] Petitioners request a writ of certiorari to the Court of Appeals for the First Circuit to review a total of 14 judgments entered in favor of 36 respondents. The published decision, discussed in text,

respondent was notified by letter that his appointment would terminate at a specified date between June 30 and August 8, 1977. On June 19, 1978, Rafael Rivera Fernandez filed a complaint alleging that the terminations violated 42 U. S. C. § 1983. The District Court dismissed the suit, holding that the action had accrued on the date the employees received the letters and that the claims were therefore barred by the applicable 1-year statute of limitations, P. R. Laws Ann., Tit. 31, § 5298(2) (1968). The Court of Appeals for the First Circuit reversed on the ground that the limitations period did not begin running until respondents' [**29] appointments ended. 648 F.2d 765 (1981).

The decision below is contrary to a recent decision of this Court: *Delaware State College v. Ricks*, 449 U.S. 250 (1980). In that case, Ricks filed suit alleging that the denial of tenure at a state college deprived him of his rights under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, and under 42 U. S. C. § 1981. And we held that the applicable limitations periods began to run when Ricks was denied tenure, rather than on the date his employment terminated. His action was, therefore, time-barred.

The Court of Appeals for the First Circuit distinguished *Ricks* on the ground that Ricks had alleged that *denial of tenure* was the "unlawful employment practice," whereas here respondents allege that *termination of their employment* as administrators was the "unlawful employment practice." [*8]

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represents one judgment in a suit brought by 23 respondents; that decision was issued May 8, 1981. *See* 648 F.2d 765 (1981). Identical individual judgments in favor of the other 13 respondents were issued on June 11, 1981. *See* App. to Pet. for Cert. 11a (unpublished orders).

We think *Ricks* is indistinguishable. When Ricks was denied tenure, he was given a 1-year "terminal" contract. Thus, in each case, the operative decision was made -- and notice given -- in advance of a designated date on which employment terminated.[2]

[2]In *Ricks*, we held that the proper focus is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful. 449 U.S., at 258. The fact of termination is not itself an illegal act. In *Ricks*, the alleged illegal act was racial discrimination in the tenure decision. *Id.*, at 259. Here, respondents allege that the decision to terminate was made solely for political reasons, violative of First Amendment rights. There were no other allegations, either in *Ricks* or in these cases, of illegal acts subsequent to the date on which the decisions to terminate were made. As we noted in *Ricks*, "[mere] continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id.*, at 257. In the cases at bar, respondents were notified, when they received their letters, that a final decision had been made to terminate their appointments. The fact that they were afforded reasonable notice cannot extend the period within which suit must be filed. We therefore grant certiorari. The judgments entered below on May 8, 1981, and June 11, 1981, are

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[2] Delaware State College had a policy of giving a final 1-year contract to teachers who were denied tenure. Only when that contract expired, did the "employment relationship [end]." 449 U.S., at 253. Apparently, the practice of the Puerto Rico Department of Education was similar in principle. Following a decision to terminate, the actual ending of employment was deferred to a designated date. Advance notice of termination is a customary and reasonable employment practice which affords the employee an opportunity to find another job.

reversed, and the cases are remanded for further proceedings consistent with this decision.

Reversed and remanded.

DISSENT:

[*9] JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

While I agree with the analysis of Judge Campbell for the Court of Appeals, and therefore join in the dissenting opinion of JUSTICE STEVENS, I believe this *per curiam* disposition is particularly ill-conceived.

It is one thing to hold, as was held in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), that for the purpose of computing the limitations period, a cause of action for denial of a benefit such as tenure, and consequent damage, accrues when the plaintiff learns that he *has been* denied that benefit; it is quite another to hold, as the Court does here, that a cause of action for damages resulting from an unconstitutional termination of employment accrues when the plaintiff learns that he *will be* terminated. To my knowledge, such a rule has no analogue in customary principles of limitations law. *See* 4 A. Corbin, Contracts § 989 (1951) ("The plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation; and he [**30] would be so penalized if the statutory period of limitation is held to begin to run against him immediately").

The thrust of the Court's decision is to require a potential civil rights plaintiff to measure the time for filing his claim from the moment some form of injunctive relief first becomes

available. The effect of this ruling will be to increase the number of unripe and anticipatory lawsuits in the federal courts -- lawsuits that should not be filed until some concrete harm has been suffered, and until the parties, and the forces of time, have had maximum opportunity to resolve the controversy.

Because this case is plainly distinguishable from *Ricks*, and the decision potentially far-reaching in its impact, the issue should be decided only upon plenary review. The Court's summary reversal is therefore particularly inappropriate, and I respectfully dissent.

[*10] JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

After noting that most judges who have confronted the issue have reached a conclusion at odds with the Court's holding today, Judge Campbell, writing for the Court of Appeals, cogently explained why the decision in *Delaware State College v. Ricks*, 449 U.S. 250, is not dispositive and should not be followed in this case:

> "The issue of when the cause of action accrues depends, we believe, on when the alleged unlawful act occurred. It is necessary, therefore, to identify the unlawful act. Where, as here, the claim is that an employment decision was made for a prohibited reason, it could be argued that the unlawful act was the making of the decision, rather than the implementation of it. But we think such a refined rule would depart too sharply from the understanding of ordinary people. The plaintiffs in these cases are complaining that they were demoted or discharged, not merely that a decision was made on a particular

> occasion, of which notice was then given, to take such action against them. Had the decision been made but not yet implemented, equitable relief might have been sought to forestall irreparable harm, but it is unlikely that plaintiffs would have sought or received damages until or unless the threatened action was consummated. The alleged unlawful act was revocable, incomplete and, for practical purposes, nonexistent until the actual demotion or discharge.

"Moreover, important policies of judicial administration favor a rule based on the date of implementation. While the date of notice in the present cases was easily established, other cases would surely arise in which resolution of that question would require lengthy proceedings. Notice might be oral, or it might be ambiguously phrased, or it might be transmitted by one whose authority [*11] is subject to question. We see no value in requiring courts and parties to devote their resources to litigating the adequacy of notice, when the date of the action itself is easily determined. In saying this we are aware that the Supreme Court has declined to reach out for an easily identified date when that date bears no genuine relationship to the act of which plaintiff complains. *Compare Delaware State College v. Ricks*, [449 U.S. 250] (1980) (date of termination not sufficiently connected to the challenged denial of tenure), discussed *infra*. But where, as here, the date that is most closely related to the plaintiffs' claim is also the date most easily identified, we think concern for adoption of the rule that best promotes certainty and eliminates litigation over technical niceties is well warranted.

"After the district court's decision of these cases, the Supreme Court decided *Delaware State College v. Ricks, supra*. Defendants contend that that decision compels

affirmance here. We disagree. Ricks, a black Liberian instructor, was informed in June 1974 that the faculty of Delaware State College had voted to deny him tenure. In accordance with the school's usual practice, he was thereafter [**31] granted a one-year terminal contract, after which his employment with the school ended. In his suit alleging discrimination on the basis of national origin, Ricks contended that the limitations period under Title VII began to run only when he left the university in June 1975. The Supreme Court rejected this argument and concluded that Ricks' cause of action had accrued when he was notified of the denial of tenure, in June 1974, and that his suit was therefore barred. The Court focussed on the allegations of Ricks' complaint, which it found to charge discrimination in the denial of tenure, not in the discharge or any other subsequent action. The Court held that the denial of tenure was the 'unlawful employment practice' within the meaning of Title [*12] VII, and that the date of that action was therefore the beginning of the limitations period. Three justices, in dissent, accepted the majority's analysis (*i. e.*, that denial of tenure, not discharge, was the unlawful employment practice) but placed the denial of tenure at a later date because of the later decision of an internal grievance board. Justice Stevens, alone among the justices, took the view that denial of tenure is analogous to advance notice of discharge. Based on that analogy, he argued that the date of discharge should control.

"Refusal of the *Ricks* majority to adopt Justice Stevens' analogy does not seem to us in any way to repudiate the precedents to which he sought to draw an analogy. The majority held merely that the denial of tenure in the academic setting is fundamentally different from a notice of discharge; it is a distinct and separate employment action, with important and far-reaching consequences for all aspects of the employee's status. While denial of tenure is often followed

by discharge, it is not always, and the consequences of denial of tenure are not dependent on its being followed by discharge. The Court found that Ricks' complaint was based on the denial of tenure, which was effective immediately; it followed, therefore, that the limitations period began as soon as Ricks received notice of that action. Here, plaintiffs complain of discharges and demotions, not of any distinct event that occurred on an earlier date. The letters notifying them of the planned actions were notice and nothing more; they were not actions in themselves comparable to the denial of tenure.

"To be sure, as we have said, one can argue that the notices themselves mirror the allegedly discriminatory motives of the defendants. One can also argue that a suit for injunctive relief might lie after receipt of notice (or, indeed, even before) to forestall threatened irreparable harm. Still plaintiffs' quarrel is with their demotions [*13] and discharges -- not with the notices themselves. No actual harm is done until the threatened action is consummated. Until then, the act which is the central focus of the plaintiffs' claim remains incomplete. Such was not the situation in *Ricks*, where the denial of tenure was itself the completed act being challenged.

"We conclude, therefore, that *Ricks* is inapplicable to these cases, and that the district court erred in dismissing the complaints." 648 F.2d 765, 768-770 (CA1 1981) (footnotes omitted).

For the reasons stated by the Court of Appeals, I respectfully dissent.

APPENDIX J

301 F.3d 240; 2002 U.S. App. LEXIS 15334; 170 L.R.R.M. 2789; 146 Lab. Cas. (CCH) P59,606; 59 Fed. R. Serv. 3d (Callaghan) 498; 19 I.E.R. Cas. (BNA) 47

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-50117, No. 01-51010

[Filed July 31, 2002]

HAROLD MERRITT HITT,
Plaintiff-Counter-Defendant-Appellee,

versus

JERRY CONNELL, ETC.; ET AL.,
Defendants,

JERRY CONNELL, Bexar County Constable, Precinct 2, Individually and in His Official Capacity,
Defendant-Counter-Claimant-Appellant.

Appeals from the United States District Court
for the Western District of Texas.
SA-99-CV-173.
H F Garcia, US District Judge.

Former deputy constable brought civil rights action against constable, for dismissing him in alleged retaliation for his exercise of First Amendment associational rights in participating in union activity. The United States District Court for the Western District of Texas, H.F. Garcia, J., entered judgment on jury verdict in favor of deputy, and constable appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) deputy constable was injured, and his cause of action accrued, only when his employment was terminated; (2) local civil service commission did not serve as final decision-maker with respect to employment decisions in local constables' office, so that commission's decision upholding deputy constable's dismissal did not preclude deputy from recovering, on First Amendment retaliation theory, from constable for constable's role in his dismissal; (3) admission of other bad acts evidence regarding constable's acts of discrimination against other deputies was not abuse of discretion; and (4) deputy's vague, conclusory, and uncorroborated testimony concerning his emotion distress upon being dismissed from his position was insufficient to support jury's award of emotion distress damages.

AFFIRMED in part, VACATED in part, and REMANDED.

Before JONES, EMILIO M. GARZA, and STEWART, Circuit Judges. CARL E. STEWART, Circuit Judge, concurring in part and dissenting in part.

OPINION

[*243] EDITH H. JONES, Circuit Judge:

In this 42 U.S.C. § 1983 action, the jury found that Bexar County, Texas, Constable Jerry Connell fired deputy constable Harold Merritt Hitt in retaliation for Hitt's exercise

of his First Amendment right to freedom of association. The jury awarded Hitt $300,000 in compensatory damages, three-fourths of which was for non-pecuniary harms like "mental and emotional distress". The district court subsequently awarded Hitt approximately $88,500 in attorney's fees and costs pursuant to 42 U.S.C. § 1988. Connell has appealed both the judgment and the award of attorney's fees.

We hold principally that the Bexar County Civil Service Commission's decision upholding Hitt's termination did not break the causal connection between the protected activity and the adverse employment action, and Connell was not entitled to qualified immunity. However, Hitt introduced insufficient evidence to support an award of nonpecuniary damages, so [*244] that a portion [**2] of his damages must be vacated and the attorney's fee award remanded for reconsideration.

I. BACKGROUND

Harold Merritt Hitt was employed as a deputy constable in precinct 2 of Bexar County from 1993 until March 1997, when he was fired by Constable Connell. Hitt alleged, and a jury found, that his employment was terminated because Connell disapproved of Hitt's involvement with two affiliated labor unions, the Alamo Area Peace Officers' Association and the Texas Conference of Police and Sheriffs ("TCOPS").

The dispute between Connell and Hitt began in October 1995 when Connell ordered his deputies to start reporting to the office 15 minutes before their shifts were scheduled to begin. Deputy Hitt, who was serving as the secretary of the local union, wrote to TCOPS for advice about getting paid for these extra 15 minutes. Connell learned of Hitt's letter and called a general meeting of his deputies, one of whom surreptitiously tape-recorded what was said. Connell

reiterated that his deputies would not be paid for the 15 minutes before their shifts, but his main point was that salary grievances should not be aired outside the constable's office. Connell suggested that deputies [**3] who continued to complain to the union were in danger of losing their commissions.

Three deputies -- Ray Mullins, Joe Algueseva, and Robert Whitney -- testified at trial that Constable Connell spoke to each of them privately not long after this meeting and told them that he would not tolerate union activity in his office. Each deputy testified that Connell referred specifically to Hitt and said that he intended to fire Hitt because he was a "troublemaker." One of the deputies, Ray Mullins, served as president of the local union. Mullins tape-recorded a conversation in which Connell said several times that they would have a "running gun battle" if Mullins did not quit the union. Connell threatened to "play dirty" and said he would start by taking away Mullins's $500 monthly car allowance. During this recorded conversation, Connell observed in passing that he could fire Hitt with impunity.[1]

[**4] Connell fired Hitt in March 1997. Connell testified that he harbored no ill will toward the deputies who were active in the union. Moreover, Connell insisted that Hitt would have lost his job regardless of his union activity because Hitt had made a "bomb threat" in a January 1997 telephone conversation with his immediate supervisor, Deputy Robert North.

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[1] Mullins nevertheless remained active in the union, and Connell fired him in early 1996. Mullins appealed the decision, the Bexar County Civil Service Commission ordered that Mullins be reinstated, and he was assigned to a new precinct.

The gist of the telephone conversation is not in dispute. Hitt was angry that North had assigned a first-year constable to patrol traffic in a certain neighborhood. In his account of the conversation, which was written approximately three weeks after the telephone conversation, Deputy North wrote:

> Sgt. Hitt stated, was I trying to get him (Sgt. Hitt) in trouble or fired. Sgt. Hitt stated, he knew what was going on and that I (Sgt. North) was fixing to be in the war. . . .
>
> Sgt. Hitt stated, that when the bomb went off with Horn (Asst. Chief Horn) that it might get my (Sgt. North) legs also.
>
> As Sgt. Hitt and myself (Sgt. North) are both Vietnam veterans, it could have meant that the bomb, when it went off, [*245] would take out Asst. Chief Horn, and possibly my (Sgt. North) legs, as we both had seen in Vietnam.
>
> This [**5] statement could have only meant to be taken figuratively. But I don't know this for sure. Sgt. Hitt's tone of voice was filled with a lot of anger.

Hitt concedes that Deputy North's account of the conversation is generally accurate. Hitt argues, however, that violent figures of speech were used regularly around the office (e.g., Connell's "running gun battle") and that "the war" and "the bomb" referred to an ongoing criminal investigation of the constable's department.

Sergeant Gerardo De Los Santos of the Texas Rangers testified at trial that he had been investigating the constable's office since Deputy Mullins had contacted him in December

1995. At the time of the telephone conversation between Hitt and North, Sergeant De Los Santos was completing his investigation and had decided that there was sufficient evidence of retaliation and discrimination to file a report with the Bexar County District Attorney's Office. (He interviewed and took statements from Hitt in January and February of 1997, and then filed his report in late February.)

Deputy North admitted at trial that he had never really believed that Hitt was making a legitimate bomb threat. Consequently, North waited [**6] three weeks before informing Constable Connell and Chief Deputy Chuck Horn of the conversation, and one reason why he submitted the report was that he had been ordered "to look for things to write Hitt up about." Then, after North submitted the memorandum quoted above, Chief Deputy Horn instructed North to revise his memo and omit any suggestion that Hitt's reference to a "bomb" should be taken figuratively.

In February 1997, Constable Connell delivered a proposed notice of termination to Hitt. Citing the telephone conversation between Hitt and North, Connell wrote that such "unprofessionalism . . . cannot and will not be tolerated." On March 5, Connell informed Hitt that his employment was terminated. Hitt appealed his dismissal to the Bexar County Civil Service Commission, but the commissioners who heard the appeal voted to uphold Constable Connell's decision.

Hitt filed this 42 U.S.C. § 1983 action in February 1999. Before trial, the district court dismissed all claims except for Hitt's free speech and free association claims against Connell in his individual capacity. Then, at the close of evidence, the district court granted judgment as a matter of law [**7] for Connell on the free speech claim. The jury returned a verdict

for Hitt on the First Amendment association claim and awarded him $300,000 in compensatory damages.

The district court entered judgment for Hitt and, pursuant to 42 U.S.C. § 1988, awarded Hitt $88,487.94 in attorney's fees and expenses. Connell's appeals of both awards have been consolidated.

II. DISCUSSION

The First Amendment protects a public employee's right to associate with a union. As this court has stated,

> This right of association encompasses the right of public employees to join unions and the right of their unions to engage in advocacy and to petition government in their behalf. Thus, the first amendment is violated by state action whose purpose is either to intimidate public employees from joining a union or from taking an active part in its affairs or to retaliate against those who do.

Boddie v. City of Columbus, Miss., 989 F.2d 745, 749 (5th Cir. 1993), quoting *Professional Ass'n of College Educators v. El* [*246] *Paso County Community College Dist.*, 730 F.2d 258, 262 (5th Cir. 1984) (citations omitted).

To prevail on his First Amendment [**8] retaliation claim, Hitt had to show that (1) he suffered an adverse employment action, (2) his interest in "associating" outweighed the constable's interest in efficiency, and (3) his protected activity was a substantial or motivating factor in the adverse employment action. *Breaux v. City of Garland,* 205 F.3d 150, 156, 157 n.12 (5th Cir. 2000); *Boddie*, 989 F.2d at 747. Connell's principal arguments on the merits focus on

the third element of causation. He contends that Hitt's participation in union activity was not a motivating factor in his discharge because the county civil service commissioners (who had no retaliatory animus) actually made the decision or, alternatively, Connell fired Hitt because of the bomb threat. The jury concluded, however, that Constable Connell made the decision to fire Hitt and that he did so in retaliation for Hitt's protected activity. Their verdict may be overturned only if, "after viewing the trial record in the light most favorable to the verdict, there is no legally sufficient evidentiary basis for a reasonable jury to have found for the prevailing party." *Mato v. Baldauf*, 267 F.3d 444, 450-51 (5th Cir. 2001) [**9] (quotations and citations omitted).

A. Statute of Limitations

Connell's contention that this suit was time-barred is easily rejected. While Texas's two-year statute of limitations applied to Hitt's constitutional injury claims, *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001), the date a § 1983 claim accrues is governed by federal, not state law. The limitations period begins to run when the plaintiff "becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." *Helton v. Clements*, 832 F.2d 332, 335 (5th Cir. 1987).

Connell tries to argue that Hitt's retaliation claim accrued at some time before his March 1997 termination, either when Hitt "felt his job was threatened" at the October 1995 office meeting; or when Hitt acknowledged in a December 1995 memo that he was afraid he was going to be fired; or when Hitt received a proposed notice of termination on February 14, 1997. If the cause of action accrued on any of these dates, then Hitt's lawsuit -- filed on February 16, 1999 -- would not be timely.

But neither the perception of a threat to one's job, nor fear of being fired, nor [**10] even the proposed notice of firing constitutes an actionable *injury*. In this context, the injury is unlawful retaliation resulting in an "adverse employment action," such as a discharge, demotion, or formal reprimand. *See Breaux*, 205 F.3d at 157-58. Hitt was injured, and his cause of action accrued, when his employment was terminated on March 5, 1997. The lawsuit was timely.[2]

[**11] [*247] B. The Civil Service Commission

The second (and most difficult) question in this case is the legal effect of the Bexar County Civil Service Commission's decision upholding the termination of Hitt's employment. Connell recognized the importance of this fact, but he vacillated between characterizing the commission, on one hand, as a quasi-judicial body whose findings of fact were

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[2] Connell's argument rests on a misreading of the Supreme Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980). In Ricks, the plaintiff alleged that the college unlawfully discriminated against him when it denied him tenure. After denying him tenure, however, the college offered Ricks a "terminal" employment contract; both parties understood that Ricks had to leave at the end of the year. The Supreme Court held that the statute of limitations began to run when the college reached a final decision denying tenure, rather than when Ricks's employment ultimately ceased. The result hinged on the fact that Ricks complained about a single adverse employment action: the denial of tenure. As the Court clearly explained, "If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment. But the complaint alleges no such facts." *Ricks*, 449 U.S. at 255-58, 101 S. Ct. at 503-04.

entitled to preclusive effect in this § 1983 action; and, on the other, as an executive board, which has the final decision-making power with respect to all personnel matters in Bexar County.

In his motion for summary judgment, Connell urged the court to give issue or claim preclusive effect to the commission's finding that Hitt made a credible bomb threat that warranted dismissal. As Connell pointed out, the Supreme Court has "long favored application of the common-law doctrines of collateral estoppel (as to issues) and res judicata (as to claims) to those determinations of administrative bodies that have attained finality." *Astoria Fed. Sav. & Loan Ass'n. v. Solimino,* 501 U.S. 104, 107, 111 S. Ct. 2166, 2169, 115 L. Ed. 2d 96 (1991). Further, federal courts must ordinarily give a state [**12] agency's decision "the same preclusive effect to which it would be entitled in the state's courts." *Univ. of Tennessee v. Elliott*, 478 U.S. 788, 799, 106 S. Ct. 3220, 3226, 92 L. Ed. 2d 635 (1986). This court has implied, however, that federal rules of claim preclusion may apply to determine whether § 1983 claims are barred from litigation in federal court by the outcome of prior unreviewed state administrative adjudications. *Frazier v. King*, 873 F.2d 820, 823-25 (5th Cir. 1989).[3] The magistrate

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[3] Frazier opined, over a dissent and before Astoria was decided, that federal preclusion law, if applicable, would not prevent a plaintiff's filing a § 1983 claim following state administrative proceedings. 873 F.2d at 824-25. But the court specifically declined to decide whether federal or state claim preclusion applied. Since Frazier and Astoria, the circuits, curiously in light of Astoria's unequivocal statement, have split over whether to follow state claim preclusion principles in regard to § 1983 claims that are filed in federal court after unreviewed state administrative proceedings. Compare *Miller v. County of Santa Cruz,* 39 F.3d

judge found, in a ruling adopted by the district court, that the civil service commission's decision was entitled neither to claim nor issue preclusive effect on Hitt's subsequent § 1983 action. Whether those conclusions were correct or not is of no moment, since Connell has not appealed them.

[**13] Instead, the argument Connell ultimately adopted at trial and now pursues on appeal is that the Bexar County Civil Service Commission -- rather than Constable Connell -- is the final decision-maker with respect to employment decisions in the constables' offices. It is beyond dispute that the commissioners conducted an independent inquiry into Hitt's discharge and were not motivated by any improper motive. Consequently, if the commission is the final decision-maker, then the causal [*248] connection between Hitt's constitutionally protected activity and the adverse employment action is broken, and Connell may not be held liable. *See Mato v. Baldauf*, 267 F.3d 444, 450 (5th Cir. 2001); *Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996).

In most "causal connection" cases, the determinative question is whether the discriminatory or retaliatory motive of

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1030, 1037-38 and n.7 (9th Cir. 1994) (state claim preclusion rules generally apply), with *Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3d Cir. 1993) (no preclusion for non-attorney state administrative tribunals), and *Dionne v. Mayor and City Council of Baltimore*, 40 F.3d 677, 682-84 (3d Cir. 1994) (federal claim preclusion governs).

To her credit, the magistrate judge applied a state law claim preclusion rule. The applicability of the state law of issue preclusion, also applied, is not in doubt. *See Univ. of Tennessee v. Elliott, supra; United States v. State of Texas*, 158 F.3d 209, 304 (5th Cir. 1998).

a subordinate employee may be imputed to the titular decision-maker. *Id.* A decision-maker may serve as the conduit of the subordinate's improper motive, for example, if he merely "rubber-stamps" the recommendation of a subordinate. This case, however, poses the logically antecedent question how to [**14] identify the official decision-maker.

The official or formal decision-maker may often be identified by a rule, e.g., an employee handbook or a company organizational chart. For public entity employers, it is appropriate to look to the statutory authority of the official or board that is alleged to have made the decision. Unlike a Texas school board, for example,[4] a county civil service commission does not have express statutory responsibility to act as the final decision-maker with respect to individual employment decisions. The relevant statute requires only that each civil service commission "adopt, publish, and enforce rules" regarding the selection of county employees; promotions, seniority, and tenure; layoffs and dismissals; disciplinary actions; grievance procedures; and similar matters. TEX. LOCAL GOVT. CODE § 158.009(a). But the statute imposes no superintending responsibility over individual employment decisions. While it is conceivable that a commission could promulgate a rule that no employment decision becomes final until approved by the commission, no such rule is present here.

[**15] Under its governing rules, the commission is authorized to review and approve, reverse or modify an

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[4] *See* TEX. EDUC. CODE § 21.211 (authorizing school boards to "terminate a term contract and discharge a teacher at any time for . . . good cause as determined by the board").

adverse employment decision if an employee elects to appeal it. But the mere authority to review an employment decision is not decisive. The commission became involved as an adjudicative tribunal after Hitt chose to appeal his notice of termination. Its task was to review Constable Connell's decision for conformity with applicable law and regulations, not to initiate Connell's action or generally superintend Connell's employment practices.

In light of these procedures, Connell's reliance on the Eleventh Circuit's decision in *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328 (11th Cir. 1999), is misplaced. In that Title VII retaliation case, Stimpson, a police officer, alleged that the City of Tuscaloosa was motivated unlawfully when it fired her. The Eleventh Circuit emphasized three times in its brief opinion that Alabama law unequivocally deprives the city of power to discharge a police officer and that the authority to terminate employment rests solely with a statutorily-created civil service board. *Id.* at 1330, 1331, 1332. Stimpson thus held that [**16] the City of Tuscaloosa could not be liable for retaliation because the civil service board was, as a matter of law, the actual decision-maker, and there was no evidence that the board was a mere conduit for the city's supposed discriminatory motive.

Just as clearly, the Bexar County Civil Service Commission did not assume final decisionmaking authority. The commission did not *finalize* a decision that Constable Connell had merely recommended or proposed. Although the commission [*249] did conduct its own review of Hitt's termination, it did so in a quasi- judicial capacity.

C. Qualified Immunity and *Mt. Healthy*

In the third issue raised on appeal, Constable Connell seeks to avail himself of the principle that a public employer may escape liability by proving that it would have taken the same adverse employment action "even in the absence of the protected conduct." *Gerhart v. Hayes*, 217 F.3d 320, 321 (5th Cir. 2000) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977)). Connell contends that he is entitled to qualified immunity because an objectively reasonable officer would have believed [**17] that he could lawfully terminate Hitt's employment -- notwithstanding Hitt's involvement with the union -- because of the bomb threat against Deputy North and Chief Deputy Horn. Cf. *Gonzales v. Dallas County, Texas*, 249 F.3d 406, 412 (5th Cir. 2001).

Connell fails to apprehend the significance of the jury finding that he fired Hitt because of Hitt's union membership and not because of the bomb threat. The jury was instructed on Connell's Mt. Healthy defense: In order to find a violation of Hitt's rights, they had to decide, *inter alia*,

> whether the defendant has shown by a preponderance of the evidence that the action he took against the plaintiff was for other reasons, regardless of whether or not the plaintiff exercised his protected association activity. If you find that the defendant would have taken the same action against the plaintiff for reasons apart from the association activity, then your verdict should be for the defendant.

The jury verdict rejects Connell's explanation of the employment decision. Their factual finding is supported in the record. *See Boddie v. City of Columbus, Miss.*, 989 F.2d

745, 748 (5th Cir. 1993). [**18] No reasonable officer could have concluded that firing Hitt because of his union affiliation was legally permissible. *Id.* Further, because the jury discredited Connell's explanation, the basis for his qualified immunity contention was vitiated.[5]

D. Evidentiary Rulings

Connell contends that the district court committed reversible error in admitting into evidence (1) testimony regarding disciplinary actions that Connell took against Mullins and other deputies and (2) the audiotape recordings of several meetings and conversations involving Connell. We review the [**19] district court's decision to admit this evidence for an abuse of discretion. *United States v. Vega*, 221 F.3d 789, 803 (5th Cir. 2000).

Other deputies, including Ray Mullins, were allowed to testify that they were discharged or otherwise discriminated against because of their participation in the union. Connell contends that admitting this evidence violated Federal Rules of Evidence 404 and 403, inasmuch as the other deputies' testimony was used "to show that Connell's actions with other employees supposedly proves [sic] his conduct in Hitt's case is improper"; and, even assuming this testimony was admissible, the danger of unfair prejudice outweighed its probative value. This testimony was admissible, however, as

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[5] The jury verdict distinguishes this case from *Gonzales v. Dallas County*, 249 F.3d 406 (5th Cir. 2001), in which summary judgment was granted to a constable who fired one of his deputies at least in part because of the deputy's undisputed use of excessive force. Here, the jury had to determine, whether the disputed bomb threat was a credible threat and an actual motivating factor in Hitt's firing, and they found against Connell.

proof of Connell's [*250] motive in firing Hitt. FED. R. EVID. 404(b). Moreover, the testimony was admissible to impeach Connell's statements on multiple occasions that he was "a union man" and that he had no animus against TCOPS or any other police union. The district court did not abuse its discretion in admitting this evidence.

Connell's second argument is that the district court erred in admitting two audiotapes (as well as transcripts of those tapes) that were not [**20] properly authenticated. We disagree. Both deputies who recorded Connell's statements testified about how they made the recordings, and Connell does not dispute their identification of his voice on the tapes. Connell has not produced sufficient evidence to cast doubt on the reliability of the tapes or the transcripts prepared from them.

E. Compensatory Damages

Connell challenges the jury's award of $300,000 in compensatory damages as excessive because Hitt presented little or no evidence of his nonpecuniary damages. We agree.

The verdict form did not separate pecuniary and nonpecuniary damages. However, during his closing argument, Hitt's attorney argued that lost earnings, both past and future, amounted to $76,000. Hitt's attorney then explained the jury question on damages:

> Interrogatory Number 3 is the money issue. . . I think you start there with the basic lost income of [$]76,000, and then whatever you ladies feel the loss of retirement, loss of job satisfaction, worry about no job, embarrassment within the law enforcement field. What's all that worth in addition to the [$]76,000? I'll

> leave that to you. But it should be a reasonably large sum of money.

[**21] Based on this representation to the jury, there is no plausible alternative but that the jury awarded Hitt $224,000 in non- pecuniary damages for mental anguish, loss of job satisfaction and prestige, and embarrassment.

The question, therefore, is whether Hitt's evidence of non-pecuniary damages is legally sufficient to warrant an award of $224,000. Our review of non-pecuniary damages is for abuse of discretion. *Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1046 (5th Cir. 1998).

This court has articulated in detail the kind of evidence needed to support compensatory damages for mental anguish or emotional distress. *See, e.g., Vadie v. Mississippi State Univ.*, 218 F.3d 365, 376 (5th Cir. 2000); *Brady v. Fort Bend County*, 145 F.3d 691, 718-20 (5th Cir. 1998); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 940 (5th Cir. 1996). The same principles would logically apply to other nonpecuniary types of damages such as those urged by Hitt. For starters, we have emphasized that "hurt feelings, anger and frustration are part of life," and are not the types of emotional harm that could support an award of damages. [**22] *Patterson*, 90 F.3d at 940. The plaintiff must instead present *specific* evidence of emotional damage: "[T]here must be a 'specific discernable injury to the claimant's emotional state,' proven with evidence regarding the 'nature and extent' of the harm." *Brady*, 145 F.3d at 718 (quoting *Patterson*, 90 F.3d at 938, 940). To meet this burden, a plaintiff is not absolutely required to submit corroborating testimony (from a spouse or family member, for example) or medical or psychological evidence. *Brady*, 145 F.3d at 718, 720. The plaintiff's own testimony, standing alone, may be sufficient to

prove mental damages but only if the testimony is "particularized and extensive" enough to [*251] meet the specificity requirement discussed above: "'Neither conclusory statements that the plaintiff suffered emotional distress nor the mere fact that a constitutional violation occurred supports an award of compensatory damages.'" *Brady*, 145 F.3d at 720, 718 (quoting *Price v. City of Charlotte*, 93 F.3d 1241, 1254 (4th Cir. 1996)).

Hitt did not satisfy these standards. The record is devoid of any corroborating evidence [**23] with respect to Hitt's emotional distress or other elements of nonpecuniary damage. There is no medical evidence, no testimony from family members or co- workers, no evidence of physical manifestations of distress. In sum, all the evidence that the jury heard was Hitt's testimony that his discharge

> was emotionally trying. I was depressed. I was out of work. I was embarrassed because it never should have happened. And it made me very defensive in terms of applying for jobs and having to go through and explain, if it got to that point what had gone on and why I was out looking for work.
>
> I've been around law enforcement in Bexar County for a number of years. And people ask you, hey, what's going on. You know, how come you got fired. It's kind of a blight on your reputation, and it does affect you emotionally.

At that point, Hitt's attorney turned to the question of lost income. Aside from a few other scattered statements, the quoted testimony is all the evidence of mental anguish that Hitt presented.

Our conclusion in Brady applies equally well to this case: The plaintiff's testimony is "vague, conclusory, and uncorroborated . . . . [and] cannot legally support [**24] mental anguish damages." *Brady*, 145 F.3d at 720. The district court thus abused its discretion in entering judgment for Hitt in the amount of $300,000. The evidence presented at trial supports the $76,000 in damages for lost income but not the remaining $224,000 in non-pecuniary damages.

F. Attorney's fees

In a consolidated appeal, Connell challenges the district court's decision to award attorney's fees and expenses in the amount of $88,487.94 to Hitt's attorney. *See* 42 U.S.C. § 1988. Appellate review of this award would have been hampered in any event by appellant's apparent failure to include the district court decision in the appellate record. But because we have substantially reduced the judgment, it is prudent to remand the fee award for reconsideration. We express no opinion on the award.

III. CONCLUSION

In Cause No. 01-50117, we AFFIRM the judgment of liability, but VACATE the award of damages and REMAND with Instructions to enter judgment for $76,000. In Cause No. 01-51010, the district court's judgment awarding attorney's fees is VACATED and REMANDED for reconsideration in light of this opinion.

AFFIRMED [**25] in part, **VACATED** in part, and **REMANDED**.

CARL E. STEWART, Circuit Judge, concurring in part and dissenting in part.

I concur with the majority's resolution of the liability issues and the affirmance of Hitt's $76,000 lost wages award in cause No. 01-50117. I also agree that the jury's mental anguish award of $224,000 is excessive because Hitt's evidence on this claim was minimal. However, I do not believe that the solution is to zero out the award completely. *See Vadie v. Mississippi*, 218 F.3d 365, 375-79 (5th Cir. 2000) (finding an award of $300,000 in mental anguish damages [*252] under Title VII was excessive where the only evidence supporting a finding of emotional injury was the plaintiff's own testimony, and concluding that because the evidence presented supported an award no greater than $10,000, either remittitur or a new trial was required).

I respectfully dissent from the majority view that Hitt failed to present sufficient evidence to support some award for mental anguish. In Oden v. Oktibbeha County, Mississippi, we determined that there was sufficient evidence to [**26] support a jury award of $20,000 in compensatory damages for mental anguish when the only evidence submitted by Deputy Sheriff Oden was his own testimony that as a result of the defendants' discrimination, he experienced stress, sleeplessness, betrayal, and shame. 246 F.3d 458, 470-71 (5th Cir. 2001); *See also Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1046 (5th Cir. 1998) (concluding that the evidence, which consisted solely of Migis' testimony, was sufficiently detailed to preclude this court from holding that the district court abused its discretion in awarding $5,000 in compensatory damages for mental anguish); *Williams v. Trader Publ'g Co.*, 218 F.3d 481 (5th Cir. 2000) (upholding an award of $100,000 in compensatory damages for emotional distress, premised solely on Williams' testimony regarding her "severe emotional distress," "sleep loss," "severe loss of weight," and "beginning smoking"); *Forsyth v. City of Dallas, Tex.*, 91 F.3d 769, 775 (5th Cir. 1996) (upholding an

emotional distress award of $100,000 that was premised on the plaintiff's testimony describing "depression, weight loss, intestinal troubles, [**27] and marital problems").

In the instant case, Deputy Constable Hitt testified that his termination

> was emotionally trying. I was depressed. I was out of work. I was embarrassed because it never should have happened. And it made me very defensive in terms of applying for jobs and having to go through and explain, if it got to that point what had gone on and why I was out looking for work. I've been around law enforcement in Bexar County for a number of years. And people ask you, hey, what's going on. You know, how come you got fired. It's kind of a blight on your reputation, and it does affect you emotionally.

Hitt's claim for some compensation is supported by this court's holdings in Forsyth, Migis, Oden, Vadie, and Williams. In these cases, as in the instant case, there was no corroborating evidence, only the testimony of the plaintiffs. In addition, Hitt's testimony is arguably comparable to that of Deputy Sheriff Oden, who recovered a $20,000 award from a jury based solely on his testimony.

Along the spectrum of awards that have previously been upheld by this court, it is debatable what specific amount of mental anguish damages Hitt is entitled [**28] to. However, it is clear that he is entitled to an award that is greater than zero. Thus, for the foregoing reasons, I would vacate the jury's mental anguish award of $224,000 and either remit the award down to $20,000, or remand to the district court for a new trial on damages. In cause No. 01-51010, I concur in the

remand of the attorney's fees award for reconsideration in light of the overall reduction of the jury award.

APPENDIX K

183 F.3d 38, *; 1999 U.S. App. LEXIS 17044, **;
80 Fair Empl. Prac. Cas. (BNA) 537;
76 Empl. Prac. Dec. (CCH) P46,187

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 98-2231

[Filed July 15, 1999]

MYRTLE THOMAS,
Plaintiff, Appellant,

v.

EASTMAN KODAK COMPANY,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.
Hon. W. Arthur Garrity, Jr., U.S. District Judge.

Before Lynch, Circuit Judge, Bownes, Senior Circuit Judge, and Lipez, Circuit Judge.

Former employee brought Title VII race discrimination action against former employer. The United States District Court for the District of Massachusetts, Arthur Garrity, Jr.,

J., 18 F.Supp.2d 129, granted former employer's motion for summary judgment. Former employee appealed. The Court of Appeals, Lynch, Circuit Judge, held that: (1) action accrued when employee received notice of layoff, not when she received negative performance appraisals; (2) once employee has shown employer's reason for adverse action is pretextual, employee is not always required to produce direct evidence to demonstrate that employer's real reason was discriminatory; (3) District Court erroneously based entry of summary judgment upon nondiscriminatory reason not articulated by employer; and (4) employee met burden of showing employer's proffered reason for laying her off was pretext for race discrimination.

OPINION

[*42] LYNCH, Circuit Judge.

In 1993, Myrtle Thomas, the only black Customer Service Representative in Eastman Kodak's Wellesley, Massachusetts office, was laid off. Thomas responded with a race discrimination suit against Kodak under Title VII, 42 U.S.C. §§ 2000e to e-17, arguing that Kodak's layoff decision was discriminatory because it resulted from a ranking process that relied on racially biased performance appraisals prepared in 1990, 1991, and 1992. Kodak made two arguments in its motion for summary judgment: first, that Thomas's claim was time-barred because the performance [**2] appraisals were conducted outside of Title VII's statutory limitation period, and second, that Thomas failed in any event to present enough evidence of racial animus to support a disparate treatment claim. The district court disagreed with the first point but agreed with Kodak's second argument and granted summary judgment. Both issues are before us on appeal.

We decide both in favor of Thomas. We find Thomas's claim to be timely because the discriminatory appraisals that she is challenging first caused her concrete harm when they led to her layoff in 1993. Because we also find that she has presented enough evidence to support her claim that the performance appraisals were racially biased, we reverse the district court's grant of summary judgment and remand for further proceedings.

After thirty-five years of litigation under Title VII, cases can still present new wrinkles. This is one such case. Because it raises a number of important issues -- some new and some familiar but difficult -- we preview the key holdings.

First, when an employee claims that a layoff is discriminatory and the employer utilizes scores from past performance appraisals in an objective formula to determine [**3] who will be laid off, the limitations period runs from the date of the notice of layoff where the laid off employee has suffered no concrete earlier harm from the appraisals.

Second, once there is sufficient evidence to create a material issue of fact that the employer's articulated reason for an adverse employment action is a pretext, there is no requirement that a plaintiff always produce direct evidence to demonstrate that the real reason was discriminatory.

Third, Title VII's prohibition against "disparate treatment because of race" extends both to employer acts based on conscious racial animus and to employer decisions that are based on stereotyped thinking or other forms of less conscious bias.

Fourth, under the *McDonnell Douglas/Burdine* framework, a court may not enter summary judgment for an

employer based upon a non-discriminatory reason not articulated by the employer but identified sua sponte by the district court.

I

In reviewing a grant of summary judgment, we consider the facts in the light most favorable to the nonmoving party, drawing all reasonable inferences in that party's favor. *See Aponte Matos v. Toledo Davila,* 135 F.3d 182, 186 (1st Cir. 1998). [**4] Given the subtlety of the questions before [*43] us, we outline Thomas's experiences at Kodak in some detail.

Thomas was a long-term Kodak employee. She first began working for the company in 1974. In 1980, after working for six years in clerical and administrative positions in Kodak's Rochester, New York facility, she was promoted to Customer Support Representative ("CSR") within the Office Imaging Division and transferred to Kodak's office in Wellesley, Massachusetts.

Along with five other CSRs working out of the Wellesley office, Thomas supported customers in an assigned territory who owned Kodak copiers and other Kodak equipment. She helped salespeople perform installations, trained customers in the use and maintenance of Kodak equipment, facilitated communication between customers and sales and service personnel, and provided other forms of marketing support.

Thomas generally performed her job well. Kodak managers who supervised Thomas during her first ten years as a CSR in the Wellesley office reported variously that they were never dissatisfied with her performance, that they were "delighted" with Thomas, that her work was "excellent" and "far superior" to that of some [**5] of the other CSRs, that

she was "very much on top of things," and that she was "the perfect support person."

Co-workers and customers expressed similar sentiments. A sales representative who worked with Thomas sent a memorandum to Thomas's supervisor praising her "continuous professionalism," "very high level of commitment," and "total dedication." The sales representative later noted that he was particularly impressed with the way a certain customer "really went out of his way" to emphasize his satisfaction with Thomas's support. Another customer who contacted Kodak after Thomas's layoff described Thomas as "an irreplaceable part of the Kodak team" and explained that Thomas was the primary reason for his selection of Kodak copiers over copiers from other companies. The customer concluded: "In my many contacts with company representatives, I have not met anyone of the class and caliber of Myrtle Thomas."

Because of her high level of performance, Thomas received awards and bonuses from Kodak. In 1989, the company also changed Thomas's grade from K4 to K6, which resulted in a salary increase. According to Kodak's job description, the K6 grade was limited to CSRs who were "making an [**6] outstanding contribution to the support activities," defined as "servicing the largest and/or most sensitive accounts, developing and giving individualized presentations and/or demonstrations, and training new CSRs." Thomas received at least eight other salary increases during her years as a CSR. At the time of the 1993 layoff, Thomas was the fourth most senior CSR in the Wellesley office and earned the third highest salary.

The Kodak compensation plan stated that "[t]he company's goal for [its] pay program is to reward each

individual's job performance appropriately" and to ensure that "[p]eople with higher performance will, over time, be paid more than average performers." The company made use of annual performance appraisals in order to reach this goal. According to the compensation plan, performance appraisals were also used for a number of other purposes, including:

> A. Evaluating and documenting the performance of each individual in comparison with performance expectations for the job.
>
> B. Providing individuals with constructive feedback.
>
> C. Identifying the guidance and training that can help individuals be as successful as their ability permits.
>
> [and]
>
> D. [**7] Determining who should be promoted, transferred, demoted, terminated, laid off, and re-employed.

[*44] To conduct an appraisal, the supervisor who directed an employee's day-to-day activities filled out an appraisal form. The form contained a section pertaining to "basic performance measures," which included categories for quality of results, quantity of results, job skills, and teamwork. Another section pertained to "additional performance measures," including dependability, versatility, communications, and leadership. The form required the supervisor to give the employee a rating from 1 to 7 for each applicable category, as well as an overall rating.[1]

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[1] The lowest rating was 1 (for performance that "does not meet essential job requirements") and the highest was 7 (for performance

A separate section of the appraisal form contained space for the supervisor's comments on the evaluated categories, a description of any developmental opportunities, a description of matters discussed during the post-appraisal interview with the employee, and both supervisor and employee signatures. Each appraisal was also reviewed and signed by the appraiser's supervisor. The appraiser and the appraiser's supervisor were together responsible for the appraisal's accuracy, consistency, and conformance to company policy, including [**8] a policy favoring fair and objective evaluations, conducted "without regard to non-job-related criteria such as[] race."

Kodak intended the appraisal scores to be on a curve, company-wide. The compensation plan suggested that "performance appraisal ratings for large groups of people (approximately 100 or more) [should] average around the middle of the rating scale," but acknowledged that factors such as the amount of turnover and the percentage of long-term employees could influence the distribution of ratings in any given group, particularly groups with a small number of employees. The compensation plan suggested that appraisers [**9] attempt to validate their distribution of appraisal ratings by rank-ordering employees in the same grade and job category. After the rank ordering was complete, supervisors would finalize the preliminary ratings to agree with the rank-order results. However, these rank orderings were not discussed with employees. Supervisors were told that "appraisals verified through this process [should be]

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that "far exceeds requirements of the position"). The middle rating of 4 was considered appropriate "for individuals who regularly perform all assigned responsibilities with independence and initiative, and achieve expected results on a continual basis."

communicated by referencing performance relative to job expectations with no reference to the rank-order process."

Thomas's appraisals for 1988 and 1989 show that she was performing at a high level. In 1988, when she was responsible for more than 400 machines, Thomas received seven 5 ratings and one 6 rating, for an overall rating of 5, which was a rating "appropriate for individuals who not only achieve results and meet all expectations on a regular basis, but who go beyond these requirements from time to time." Her supervisor's comments were uniformly positive. In 1989, when she was responsible for more than 500 machines, Thomas received even higher ratings -- five 6s and three 5s, for an overall rating of 6, which meant that her "performance consistently exceeded the requirements of the [**10] position and [was] characterized by unusual initiative, resourcefulness, and creativity." Once again, the supervisor's comments were uniformly positive.

In 1989, Kodak created the position of Customer Support Manager throughout its Office Imaging organization. Thomas asked to be considered for the Wellesley position, but was told that she was not qualified. Instead, the position went to Claire Flannery, a former CSR who had been working as a division secretary. As Customer Support Manager, Flannery was responsible for supervising the six Wellesley CSRs. She remained in this position until 1993, when both she and Thomas [*45] were laid off as part of a company-wide reduction in force.

The appointment of Flannery as Customer Support Manager marked a significant downturn in Thomas's fortunes at Kodak. Although Thomas states that she and Flannery "were on a professional basis," and Flannery denies having any problems with Thomas's job performance, it appears that

their working relationship was strained. Thomas alleges that Flannery treated her differently from the other five CSRs, all of whom were white[2] (as were, in fact, all of the other CSRs during Thomas's thirteen years [**11] in the Wellesley office).

She describes a number of occasions on which she claims Flannery unnecessarily damaged her professional standing with customers. For example, on the only occasion on which Flannery accompanied Thomas to a customer training session in order to observe Thomas's work, Flannery instead took over the session and conducted the entire training herself. On another occasion, Flannery told Thomas the wrong time for a training session Flannery had scheduled on site, and then refused to write to the customer, who was upset, to explain why Thomas had been several hours late. (After Thomas proved to Flannery what had occurred by playing back Flannery's voice mail message to her, Flannery did agree to call -- but not to write -- the customer.) On a third occasion, Flannery became quite angry and attempted physically to block Thomas from leaving a CSR meeting which had been scheduled at the same time as an important training [**12] session for one of Thomas's customers.

Thomas also provides evidence from which the inference can be drawn that Flannery did not evaluate her skills fairly or give her appropriate opportunities for growth and success. For example, Flannery did not travel with Thomas as she did with the other CSRs in order to observe Thomas's interactions with customers. Flannery did not give Thomas the same type of developmental opportunities available to other CSRs. She

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[2] We use the terms "black" and "white," as Thomas has chosen this terminology.

criticized Thomas for lack of computer skills, but then failed to train Thomas when computer equipment became available. After Thomas was asked to prepare a presentation for a Kodak meeting, Flannery told her that there would not be time for her presentation, although time was found for a presentation by a white employee on a less pressing topic. Thomas was denied the opportunity to apply for sales jobs, despite her good track record in sales support activities. Flannery expressly discouraged her from applying for a management position in another division, telling her she was not qualified because she did not yet have a master's degree (Thomas was studying for one at the time), even though none of the other managers in that position [**13] had a master's degree or even a bachelor's degree. Finally, Flannery went to great lengths to prevent Thomas from meeting with Bill Cassidy, the Regional Vice President for Office Imaging, to discuss advancement opportunities, and became angry when Thomas nevertheless managed to schedule an appointment.

Thomas's most significant and concrete allegation is that Flannery gave her inaccurately low scores on her annual performance appraisals. For example, after receiving only 5s and 6s in 1988 and 1989, Thomas received a 2, four 3s, and a 4 from Flannery in 1990, for an overall score of 3. This was a below-average rating, appropriate for employees who had "a need for further improvement to achieve a middle rating [of 4]" or for employees "whose overall performance has slipped from a higher level." Thomas's performance appraisal scores in 1991 and 1992, while higher than her 1990 scores, were also inappropriately low, in Thomas's estimation -- especially when compared to the higher scores that Flannery gave to other [*46] CSRs. Thomas presents specific comparisons, discussed further below.

Thomas was distressed by the 1990 performance appraisal and refused to sign it. She also [**14] refused to sign the 1992 appraisal, and signed her 1991 appraisal only "'out of a joke,' because it was a joke." It is clear that Thomas disagreed with Flannery's evaluations; more than that -- she found them "insulting" and "shameful." To the extent that it was possible for her to compare salary and raises with other CSRs, however, she would not have noted any obvious effects of the negative appraisals, since neither her salary nor the raises she was given during Flannery's tenure as Customer Support Manager differed significantly from those of other employees. She did complain about the appraisals, both to Flannery herself and to others within Kodak, including Bill Cassidy, the Regional Vice President for Office Imaging, and Patti Weissinger, a Human Resources Representative. However, fearing retaliation from her new boss, she did not file a formal charge against Flannery with the Human Resources Department, and Kodak did not take any action in response to her informal complaints.

In January 1993, Kodak decided to reduce the number of employees in its Office Imaging Division. It selected employees for layoff using a "Performance Appraisal Ranking Process ("PAR process"), which produced [**15] a numerical score for each employee by adding together the employee's overall performance appraisal score for each of the three preceding years, after weighting the most recent score by a factor of 25 and the second most recent score by a factor of 5.[3] Thomas's PAR ranking, which was derived

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[3] This formula was used for employees whose grade remained the same for all three years. If an employee had changed grades during the three year period, the formula gave less weight to the score immediately following the grade change.

from the three appraisals conducted by Flannery, was the second lowest of the Wellesley CSRs. Since Kodak had decided to cut two Wellesley CSR positions, as well as the Customer Support Manager position, Flannery, Thomas, and the lowest ranked CSR (Eileen Lavallee) were laid off in March 1993.

II

In July 1993, four months after her layoff, Thomas filed a charge of race discrimination with the Equal Employment Opportunity Commission. The EEOC issued a "right to sue" letter in February [**16] 1996, and Thomas brought suit in May 1996.

Although her complaint asserts a variety of race discrimination claims, Thomas has focused primarily on Kodak's 1993 decision to terminate her, arguing that this decision was discriminatory because it was based on discriminatory performance appraisals conducted by Flannery from 1990 through 1992.[4] It is the layoff which is the subject

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[4] Thomas described a number of other events as evidence of unlawful race discrimination by Kodak. The district court provided a succinct summary:

> When plaintiff was transferred to Wellesley, Kodak did not fly her to Massachusetts, as it had other transferred employees. Instead, Thomas was told to drive a car that had been requested by Richard Austin, her new supervisor. The car was in disrepair, requiring a new muffler. Though other employees had two weeks in a new location before reporting to work, plaintiff was told to report right away.

[*47] of this appeal. Kodak moved for summary judgment, contending that Thomas's claim was time-barred, and in the alternative, that she had failed to present enough evidence of racial animus to reach a jury under the First Circuit's standard for showing disparate treatment once pretext has been shown. *See Udo v. Tomes*, 54 F.3d 9, 12-13 (1st Cir. 1995) (describing standard). The district court found Thomas's claim timely, but granted summary judgment to Kodak on the

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As part of plaintiff's move benefits, Kodak provided storage for her belongings. The warehouse burned in 1981, destroying virtually all of Thomas' belongings. Thomas gave Austin an inventory of her losses; in response, he asked, "Are you rich or something?" Before Thomas was reimbursed, another Kodak employee encouraged her to change her inventory listing. Defendant did not reimburse Thomas for five years.

A few months after Thomas began working in Wellesley, she was standing with a group of employees when Austin introduced two visiting sales managers. Austin introduced everyone in the group except Thomas.

In 1983, Thomas passed a co-worker in the hallway outside the department manager's office. The co-worker asked the manager if plaintiff was "here to do the cleaning."

Thomas lost a gold bracelet at work. A co-worker announced finding it just before a sales meeting, as other employees arrived. Thomas claimed the bracelet, and described it at his request. He refused to return the bracelet until he had confirmed that it did not belong to another, white female employee.

Thomas v. Eastman Kodak Co., 18 F. Supp. 2d 129, 132 (D. Mass. 1998).

merits argument. *See Thomas v. Kodak*, 18 F. Supp. 2d 129, 133-38 (D. Mass. 1998). On appeal, Thomas argues that the district court applied the standard incorrectly. Kodak defends the district court's application of the standard, while also continuing to argue that Thomas's claim is time-barred.

[**17]

III

We review the district court's grant of summary judgment de novo, *see Lennon v. Rubin*, 166 F.3d 6, 8 (1999), and will find summary judgment appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," Fed. R. Civ. P. 56(c).

A

We first address Kodak's argument that the district court erred in not dismissing the action as untimely. Title VII requires aggrieved individuals to file a charge with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). In a "deferral jurisdiction," such as Massachusetts, this period is extended to three hundred days.[5] *See* 42 U.S.C.

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[5] The full story is more complicated, in part because § 2000e-5(e) interacts with § 2000e-5(c), which imposes a sixty-day waiting period between the filing of a charge with state or local authorities and the filing of a charge with the EEOC:

§ 2000e-5(e)(1); *Mohasco Corp. v. Silver*, 447 U.S. 807, 814 n.16, 65 L. Ed. 2d 532, 100 S. Ct. 2486 (1980); *Mack v. Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181-82 (1st Cir. 1989). This relatively short limitations period serves [**18] important interests. "The limitations period[], while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect[s] employers from the burden of defending claims arising from employment decisions that are long past." *Delaware State College v. Ricks*, 449 U.S. 250, 256-57, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980). In the Title VII context, as in others, "the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Id.* at 259-60 (internal quotation marks omitted) (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. [*48] 454, 463-64, 44 L. Ed. 2d 295, 95 S. Ct. 1716 (1975)). Congress has made that value judgment.

> [A] complainant in a deferral State . . . need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved. If a complainant files later than that (but not more than 300 days after the practice complained of), his right to seek relief under Title VII will nonetheless be preserved if the State happens to complete its consideration of the charge prior to the 300-day period.

Mohasco Corp. v. Silver, 447 U.S. 807, 814 n.16, 65 L. Ed. 2d 532, 100 S. Ct. 2486 (1980). None of these subtleties is relevant to the question here, since, as the district court noted, "[p]laintiff filed her EEOC charge within the minimum 180 days of her termination, but more than the maximum 300 days after her most recent evaluation." *Thomas*, 18 F. Supp. 2d at 133 n.1.

[**19]

However, Title VII's statute of limitations is not self-executing. The three hundred day (or one hundred and eighty day) rule cannot be mechanically applied, because it is not possible to pinpoint when the limitations period begins -- i.e., when the plaintiff's claim "accrues" -- without first determining the date, or the temporal boundary, of the "alleged unlawful employment practice" referred to in § 2000e-5(e)(1).

The crux of Thomas's claim is that her layoff of tainted because the 1990-92 performance appraisals were tainted by Flannery's alleged racial bias. Thomas does not argue that Kodak's decision to utilize the PAR process to determine who would be laid off was racially biased. *See Thomas*, 18 F. Supp. 2d at 135 ("[P]laintiff does not contend that Kodak's . . . PAR layoff process[] [was itself] discriminatory."). As we understand her argument, she does not allege that Flannery and other Kodak employees participated in a conspiracy to oust her from her job because of her race, using the performance appraisals and the PAR process as a thin cover for this express discriminatory purpose. Rather, she argues that the PAR process was illegitimate under Title [**20] VII in a derivative way, because its calculations were based on discriminatory appraisal scores. If racially biased scores were plugged in to the PAR formula, she argues, then the ranking that came out must also be biased.

According to Kodak, this argument can only mean that the performance appraisals themselves constitute the "unlawful employment practice" at issue under § 2000e-5(e)(1), and thus that any claim regarding the allegedly biased performance appraisals must have accrued at the time the appraisals were conducted. Since even the most recent

appraisal (presented to Thomas in May 1992) was conducted more than three hundred days before Thomas filed her complaint with the EEOC in July 1993, Kodak asserts that Thomas is precluded from questioning the racial neutrality of any of the three performance appraisals. And without the ability to challenge the appraisals upon which the PAR process was based, Kodak notes, Thomas's discriminatory termination claim collapses.

According to Thomas, the fact that the performance appraisals were conducted more than three hundred days before she filed her EEOC charge is irrelevant, because the adverse employment decision that she is challenging [**21] -- the "unlawful employment practice" under § 2000e-5(e)(1) -- is Kodak's decision to lay her off, and not performance appraisals independently, and this decision indisputably fell within the statutory period.

Kodak's general policy stance makes sense: given that the central purpose of the statute of limitations is to protect employers from stale claims, it cannot be true that plaintiffs have an unfettered ability to reach back and litigate biased evaluations. Yet Thomas's position is also reasonable, since it seems unlikely that Title VII permits employers to take a new employment action such as a layoff which first causes an employee harm, as long as the allegedly discriminatory evaluations on which the layoff is based were conducted more than three hundred days earlier.

Counsel did not call the court's attention to any First Circuit caselaw on this point. The district court, led to believe that the First Circuit had not addressed this question, "looked for guidance elsewhere." *Thomas*, 18 F. Supp. 2d at 133. The court focused on the decision of the Third Circuit in *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407 (3d Cir.), cert.

denied, 502 U.S. 941, 116 L. Ed. 2d 330, 112 S. Ct. 379 (1991). [**22] The facts in *Colgan* do closely resemble the facts here. Like Thomas, the *Colgan* plaintiff was fired after receiving a negative performance review. *See* 935 F.2d at 1410-11. He filed a charge of age discrimination with the EEOC within three hundred days of his termination, but more than three hundred days after the negative performance review. [*49] *See id.* at 1411. The Third Circuit determined that Colgan's claim was not time-barred because it accrued at Colgan's termination, not when he received the negative review. *See id.* at 1415-21. The court concluded that "an alleged unlawful employment practice, here the performance evaluation, must have inflicted harm which was or should have been noticed, or it will not have triggered the limitations period." *Id.* at 1418. Colgan's review stated that he failed to meet job requirements and expressly warned that action would be taken unless his performance improved. *See id.* at 1410. Nonetheless, the court found that the review did not produce the requisite notice of harm to trigger the running of the statute of limitations, because "[t]he performance [**23] evaluation had no immediate consequence on Colgan's employment, such as a loss of seniority, nor did it alert Colgan to the possibility that consequences would flow from it without an opportunity for him to improve his performance." *Id.* at 1419-20. The Third Circuit based its *Colgan* analysis on a trilogy of Supreme Court cases, which we summarize briefly here. In *United Air Lines v. Evans,* 431 U.S. 553, 52 L. Ed. 2d 571, 97 S. Ct. 1885 (1977), the Supreme Court held that a flight attendant who was wrongfully forced to resign and then later rehired could not challenge the airline's refusal to grant her seniority as if there had been no break in her employment, since the relevant wrongful act -- Evans's being forced to resign -- occurred outside of the limitations period. *See id.* at 555. In *Ricks*, the Court held that the college's denial of tenure, not a later

discharge pursuant to that denial, was the event that triggered Title VII's statute of limitations. *See Ricks*, 449 U.S. at 256-58. Finally, in *Lorance v. AT&T Technologies*, 490 U.S. 900, 104 L. Ed. 2d 961, 109 S. Ct. 2261 (1989), the Court [**24] held that the Title VII limitations period begins to run when an employer adopts a seniority system, not when an employee is demoted pursuant to that system.[6] *See id.* at 912-13. Read together, this trilogy defines a notice rule: an employer action only triggers the running of the statute of limitations if that action has concrete, negative consequences for an employee, and the employee is aware or should have been aware of those consequences. *See Colgan*, 935 F.2d at 1415-21; *see also* 2 B. Lindemann & P. Grossman, *Employment Discrimination Law* 1349 (3d ed. 1996) (observing that Supreme Court cases "seem to establish a relatively simple 'notice' rule as to when discrimination 'occurs'").

[**25]

We think many aspects of *Colgan's* reasoning are correct. However, we find more direct guidance in a First Circuit case decided several years before *Colgan*. In *Johnson v. General Electric*, 840 F.2d 132 (1st Cir. 1988), a black employee

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[6] Section 112 of the 1991 Civil Rights Act later overruled *Lorance*, allowing employees to challenge a seniority system "when the system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system." 1991 Civil Rights Act, Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1079 (1991) (codified at 42 U.S.C. § 2000e-5(e)(2)). This may mean that seniority systems should be treated as an exception to the "notice rule" discussed in *Colgan*; alternatively, it may simply mean that Congress thought that the Court had misapplied the notice rule in the seniority system context.

claimed that he had been denied a promotion based on a special review process that was intentionally designed to prevent him from qualifying for promotion. *See id.* at 134. The employer contended that the plaintiff's claim accrued when the review process was first put into place, while the plaintiff insisted that the clock did not start running on his claim until he was informed that he had failed the review process and would not be promoted. *See id.* The district court, relying on *Ricks*, held that the establishment of the review process was the "unlawful employment practice" of which the plaintiff complained, and therefore started the running of the statute from that point. *See id.* Although [*50] this court affirmed the dismissal on other grounds, it disagreed with the district court's analysis, noting that the "question [is] . . . whether a claim accrues when an employee is made subject to [**26] an . . . evaluation . . ., or when that . . . evaluation is applied to deny the plaintiff particular benefits or positions." *Id.* This court chose the latter rule, holding that the notice standard is met and the statute of limitations is triggered only if "the implications [of the evaluation] have crystallized" and "some tangible effects of the discrimination were apparent to the plaintiff," i.e., if "the plaintiff is aware that he will in fact be injured by the challenged practice."[7] *Id.* at 136-37.

The decision was motivated, in part, by concerns about ripeness. The court noted that "it is [**27] far from clear whether claims under Title VII and analogous statutes would

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[7] *Johnson*, which was decided shortly before the Supreme Court's decision in *Lorance*, suggested that this rule would apply to discriminatory seniority systems as well. *See Johnson*, 840 F.2d at 134. Congress has since provided a specific accrual rule for seniority systems. *See* 1991 Civil Rights Act § 112 (codified at 42 U.S.C. § 2000e-5(e)(2)).

be ripe for adjudication until discriminatory systems [or evaluations] were actually applied to plaintiffs in particular employment decisions," and observed that "it is unwise to encourage lawsuits before the injuries resulting from the violations are delineated, or before it is even certain that injuries will occur at all." *Id.* at 136.

Johnson's notice standard serves multiple functions. By starting the limitations clock as soon as harm is noticed, or should be noticed, the standard protects employers from stale claims while also lessening the risk that employees will bring unripe claims. The notice standard protects employees as well, because it ensures that claims will not be foreclosed by events that occurred outside the limitations period that did not put the employees on notice.

The notice standard in *Johnson* also resolves the apparent contradiction between the two reasonable policy stances pressed by the litigants here. Thomas is correct that Title VII extends to a neutral employer decision-making process that relies on discriminatory evaluations. But Kodak is also right [**28] that employees do not have an unfettered right to reach back to challenge previous evaluations. The key is whether those evaluations had tangible, concrete effects at the time they were conducted. If the evaluation did cause tangible, concrete harm, the notice standard requires the injured employee to promptly bring suit to recover for those harms. Failure to do so will render any later claim regarding those particular harms time-barred.[8]

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[8] If, for example, a poor job evaluation resulted in a denial of a salary increase, notice of the denial would mark the accrual point for a pay inequity claim. Under *Ricks*, the statute would also begin to run on any other harm that was the "delayed, but inevitable,

[**29]

This means that an employer could be exposed to Title VII liability for harms stemming from discriminatory evaluations [*51] some years after the evaluations were conducted, if the evaluations first cause tangible harm to the employee at that later point. Kodak argues that this puts employers in an untenable position. We disagree, for three reasons.

First, as a matter of practicality, employers are unlikely to rely on "stale" evaluations. The older the evaluation, the less likely an employer would be to use that evaluation as the basis of an employment decision. Employers' preference for more recent evaluations is demonstrated dramatically by Kodak's own PAR formula, which used only the latest three evaluations and then weighted the most recent by a factor of 25.

Second, the passage of time would affect employees as well as employers. An employee who sought to challenge an

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consequence" of the denial of a salary increase, *Ricks*, 449 U.S. at 257-58, since "[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful," *Ricks*, 449 U.S. at 258 (internal quotation marks and emphasis omitted) (alteration in original) (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979)). *Ricks* did not address the question whether the statute of limitations would also begin to run on an unrelated harm (unrelated, that is, to the denial of a salary increase) which might later arise from the challenged employer act -- for example, whether a plaintiff's challenge to a layoff decision based on the poor evaluation could be time-barred because the evaluation initially resulted in the denial of a pay increase. As we explain below, the facts here do not require us to resolve this difficult question.

old evaluation would bear the burden of proving that the evaluation was discriminatory -- and the older the evaluation, the more difficult that task would be.

Third, the standard gives concomitant advantages to employers. It avoids forcing employees to "run to the EEOC" each time they disagree with a performance [**30] evaluation. As the district court aptly observed:

> If we apply the time bar to plaintiff's [performance appraisals], then we require a given plaintiff to file EEOC charges successively for each performance evaluation, informal feedback from a supervisor, or office rumor, so long as these events -- even if nonharmful in themselves -- might be informed by racial animus and could someday contribute to a later, harmful result. This requirement would surely disrupt the American workplace . . . .

Thomas, 18 F. Supp. 2d at 134-35. Instead, the *Johnson* notice standard allows employees to give employers the benefit of the doubt, where employees suspect that an evaluation which has yet to cause tangible harm might be tainted by bias, and encourages them to try to solve the problem by proving their actual worth to the employer. And while the standard places an ongoing obligation on employers to monitor their evaluation processes to ensure that they are free from illegal bias, employers also benefit from the opportunity to base personnel decisions on accurate, bias-free evaluations. In any event, this sort of obligation is foreseen by Title VII, since the [**31] statute encourages the elimination of both obvious and subtle forms of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).

In arguing against the application of the *Colgan* rule (which, as explained above, resembles the First Circuit standard announced in *Johnson*), *Kodak* has presented a two-stranded argument. The first strand is based on notions of fair notice to the employer. The second asserts that Thomas's timeliness argument relies on an impermissible combination of the equitable tolling and continuing violation doctrines.

Kodak would substitute for the accrual rule in *Johnson* a rule that focuses on notice to the employer. According to Kodak, the *Colgan* accrual rule makes "bad law because it allows an employee to introduce a time-barred incident where the employee has never previously contended, even in an informal process afforded by the employer, that the employee was subjected to unlawful discrimination." Appellee's Brief at 17. According to *Kodak*, this violates "the policy underlying Title VII [entitling] an employer . . . to some kind of prior notice." *Id.*

This is not an [**32] irrational position, but *Kodak* cites no authority for it. The argument calls to mind the exhaustion rule imposed by courts in the ERISA context, *see* Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 et seq., which requires employees to take full advantage of employer-internal appeals processes before bringing suit to recover denied benefits, *see McMahon v. Digital Equipment Corp.*, 162 F.3d 28, 40 (1st Cir. 1998) (noting court-imposed exhaustion rule for [*52] ERISA benefit claims). But the analogy is inappropriate. ERISA requires employers to offer employees a speedy appeals procedure for denied benefits. *See* 29 U.S.C. § 1133 (stating that employers must "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim"); 29 C.F.R. § 2560.503-1 (imposing time limits). Only

after this process is complete does the ERISA statute of limitations begin to run. *See, e.g., Godfrey v. BellSouth Telecomms., Inc.*, 89 F.3d 755, 759-60 (11th Cir. 1996); *Martin v. Construction Laborer's Pension Trust*, 947 F.2d 1381, 1385 (9th Cir. 1991). [**33]

In Title VII, by contrast, Congress chose not to impose a particular employer-internal appeals procedure. Furthermore, the statute of limitations for a Title VII claim is not tolled while an employee exhausts any internal remedy the employer has made available. *See Ricks*, 449 U.S. at 261 ("[T]he pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods."); *International Union of Elec. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236-37, 50 L. Ed. 2d 427, 97 S. Ct. 441 (1976) (holding that the Title VII statute of limitations is not tolled by a collective-bargaining grievance procedure). Thus, a court-imposed exhaustion requirement would not work well in the Title VII context, because it would place employees in the position of having to exhaust an internal appeals process of uncertain length while also bringing suit within three hundred (or one hundred and eighty) days of the employer's allegedly wrongful act.

Kodak's position bears an even closer resemblance to one aspect of the approach first explicated in *Stoller v. Marsh*, 221 U.S. App. D.C. 22, 682 F.2d 971 (D.C. Cir. 1982), [**34] and followed by a number of other courts, *see, e.g., Hale v. Marsh*, 808 F.2d 616, 620 (7th Cir. 1986); *Brown v. City of New York*, 869 F. Supp. 158, 169 (S.D.N.Y. 1994); *Woolery v. Brady*, 741 F. Supp. 667, 669-70 (E.D. Mich. 1990). The *Stoller* court held that a plaintiff could challenge an employer's wrongful reliance on discriminatory evaluations, even where the plaintiff has acknowledged that

the employer's reliance itself was not intentionally discriminatory. *See Stoller*, 682 F.2d at 979 ("Otherwise an organization could separate illegal motive from decisionmaking responsibility, contrary to the principle that Title VII applies to the employer as an organization."). This is essentially the same result that *Johnson* permits. *See Johnson*, 840 F.2d 132 at 135, 137 (citing this portion of *Stoller*).

But the *Stoller* court added a second part to this rule:

> [A]fter preparation of employee evaluations, the employing organization may protect itself from Title VII liability by establishing procedures to allow employees to screen their personnel files and to remove damaging, discriminatory [**35] information. . . . If established procedures have given an employee a reasonable opportunity to inspect the supervisory evaluations in his or her file, to challenge allegedly inaccurate materials, and to have such materials corrected or removed, and if the organization gives its employees adequate notice that these rights may be exercised, then it may rely in good faith on such evaluations in making subsequent employment decisions without violating Title VII.

Stoller, 682 F.2d at 979 (footnotes omitted). *Kodak's* "notice to the employer" argument could refer to this second half of the *Stoller* rule: Kodak apparently wants to be able to rely on Thomas's performance appraisals, because in its view Thomas had a reasonable opportunity to inspect the appraisals and to challenge inaccuracies through the "Open Door" appeals process.

We can imagine advantages of the *Stoller* rule for both employers and employees. Employers, of course, would be able to limit their liability. Employees could conceivably [*53] benefit as well, if the rule increased the likelihood that employers would implement effective review procedures. But we decline to adopt this rule [**36] -- which was, in any event, implicitly rejected in *Johnson* -- because we think any possible advantages would be outweighed by two serious risks. One is the obvious risk that employers would have carte blanche to rely on discriminatory appraisals as long as they offered their employees an "Open Door." Avoiding the first risk would entail a second: courts would need to interpret strictly the concept of "[adequate] procedures to allow employees to screen their personnel files and remove damaging, discriminatory information." This would in turn entail a degree of judicial scrutiny and interference with day-to-day employer operations that employers would be unlikely to welcome and which courts interpreting Title VII have tried to avoid. *See Hidalgo v. Overseas Condado Ins. Agencies, Inc.*, 120 F.3d 328, 337 (1st Cir. 1997) (noting courts' reluctance to "'sit as super personnel departments'" (quoting *Mesnick v. General Elec. Co.*, 950 F.2d 816, 825 (1st Cir. 1991)).

The second strand of Kodak's timeliness argument is the claim that both Thomas and the district court have relied on an illegitimate "hybrid" of the equitable tolling and continuing violation [**37] doctrines. Thomas disavows any such reliance. We make several observations in response to Kodak's argument.

First, the First Circuit doctrine of equitable tolling is simply inapplicable to these facts. Some courts permit tolling of the statute of limitations if the plaintiff knew of a harm but not of its discriminatory basis. *See* 2 Lindemann & Grossman,

supra, at 1350. But our approach to equitable tolling is narrower; First Circuit law permits equitable tolling only where the employer has actively misled the employee. *See Mack,* 871 F.2d at 185 (noting that the First Circuit's "narrow view" of equitable tolling reaches only "active deception" (internal quotation marks and citations omitted)); *Jensen v. Frank*, 912 F.2d 517, 521 (1st Cir. 1990). There is no allegation here that Kodak actively attempted to mislead Thomas about her performance appraisals.

Second, there is no need to apply the continuing violation doctrine. Commentators have labeled this doctrine "the most muddled area in all of employment discrimination law," 2 Lindemann & Grossman, *supra*, at 1351, and some courts have gone so far as to conclude that the entire doctrine [**38] is misguided and unnecessary, *see, e.g., Moskowitz v. Trustees of Purdue Univ.*, 5 F.3d 279, 282 (7th Cir. 1993). We need not enter into that debate here. We describe the First Circuit's continuing violation doctrine with only as much detail as is necessary to show that it is inapplicable to Thomas's claim.

The First Circuit has recognized two different types of continuing violations: systemic violations, which "ha[ve] [their] roots in a discriminatory policy or practice . . . [that] itself continues into the limitation period," *DeNovellis v. Shalala*, 124 F.3d 298, 307 (1st Cir. 1997) (quoting Jensen, 912 F.2d at 523), and serial violations, which are "composed of a number of discriminatory acts emanating from the same discriminatory animus, [with] each act constituting a separate wrong actionable under Title VII," *id.*; *see also Mack*, 871 F.2d at 182-84. The systemic violation doctrine is clearly inapposite because Thomas has not alleged that Kodak has "an overarching policy or practice" of conducting discriminatory evaluations. *Jensen*, 912 F.2d at 523. Kodak

apparently believes that [**39] Thomas is inappropriately attempting to shoe-horn her claim into the serial violation category. This is not so. Whether a serial violation exists does depend in part on a type of notice standard similar to the one in *Johnson*. *See Sabree v. United Bhd. of Carpenters*, Local No. 33, 921 F.2d 396, 402 (1st Cir. 1990) (stating that if an earlier event had "'the degree of permanence which should trigger an employee's awareness and duty to assert [*54] his or her rights,'" then it is not substantially related to the later event, and therefore cannot form part of a continuing violation (quoting *Berry v. Board of Supervisors of L.S.U.*, 715 F.2d 971, 981 (5th Cir. 1983))). This similarity may be the source of Kodak's argument. But the serial violation doctrine, like the systemic violation doctrine, stands as an exception to the accrual rule recognized in *Johnson*. The purpose of this exception is to permit suit on later wrongs where a wrongdoer would otherwise be able to repeat a wrongful act indefinitely merely because the first instance of wrongdoing was not timely challenged. *See* D. Laycock, *Continuing Violations, Disparate Impact in Compensation*, [**40] *and Other Title VII Issues*, 49 Law & Contemp. Probs. 53, 55 (1986) (comparing the application of the continuing violation doctrine in employment discrimination cases to its application in an antitrust case, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968), and observing that "obviously, United should not be able to continue its illegal conduct forever because no one challenged it during World War I"); J. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 Va. Envtl. L.J. 589, 615-22 (1996) (describing the history and purpose of the continuing violation doctrine); *see also Sabree*, 921 F.2d at 401 (discussing proper remedy).

In the Title VII context, the continuing violation doctrine applies where "a number of discriminatory acts emanat[e] from the same discriminatory animus, [with] each act constituting a separate wrong actionable under Title VII." *Jensen*, 912 F.2d at 522. Sexual harassment, failure to promote, and pay inequity cases often fall into this category. Plaintiffs [**41] in these cases experience harm from each employer act (e.g., a harassing comment, a denied promotion, or a smaller paycheck), for which they could recover under Title VII. Thus, under the *Johnson* standard, each act could trigger the running of the statute of limitations. The continuing violation doctrine ensures that these plaintiffs' claims are not foreclosed merely because the plaintiffs needed to see a pattern of repeated acts before they realized that the individual acts were discriminatory.

Thomas's claim presents a different question: not whether she is permitted to bring suit after many repeated harms, but rather whether harm cognizable under Title VII existed at the time she first received her performance appraisals sufficient to mean that the notice of layoff is not the date on which the limitations period began for her layoff claim. This question is more appropriately addressed under the *Johnson* notice standard.

We consider whether the date on which the limitations period begins to run should be earlier than the notice of layoff because there was earlier concerte harm to Thomas resulting from the performance appraisals. According to Kodak's compensation plan, appraisal [**42] scores were intended to affect salary levels and determine "who should be promoted, transferred, demoted, terminated, laid off, and re-employed." It is not clear whether Kodak informed employees of this intention. But even if employees were familiar with the intended possible uses of the scores, it appears that the effects

listed in the compensation plan remained abstract -- mere possibilities, not certainties.

This was particularly true in Thomas's case. Flannery's appraisals evaluated Thomas's performance as only average or below average. But the appraisals did not specify that Thomas was to suffer an immediate consequence for her alleged performance failures,[9] much [*55] less that they would mechanically lead to her being laid off. Because Thomas seeks to recover for an allegedly discriminatory layoff, we consider whether that particular consequence was apparent at the time Thomas received the appraisals. *Cf. Colgan,* 935 F.2d at 1410, 1419-20 (finding notice lacking even where an evaluation explicitly warned that adverse actions would be taken if the employee's performance did not improve). She was not told that layoffs were impending and

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[9] Under *Ricks*, we must also consider whether the appraisals led to any other concrete harm for which the layoffs were the "delayed, but inevitable, consequence." *Ricks*, 449 U.S. at 257-58. We do not find any evidence of such related harm in the record.

As noted above, it is not clear whether a separate, unrelated harm would also trigger the accrual of Thomas's layoff claim. We need not reach this question. Assuming arguendo that unrelated harms would trigger accrual of Thomas's layoff claim, accrual was not triggered here, because Thomas's appraisals did not in fact result in any tangible, concrete harms at the time they were presented to her. Although Thomas was denied some promotion opportunities during Flannery's tenure, she was not told that she lost those opportunities because of her low performance appraisals; rather, Flannery told her she lacked the proper credentials. Thomas was also not told that her salary would be affected by her low scores, and indeed, it appears that her salary kept pace with the other five CSRs throughout Flannery's tenure as Customer Support Manager.

that her scores [**43] placed her at high risk for layoff.[10] Even if she did have this information, it would fall short of the "crystallized" implications required under *Johnson*, 840 F.2d at 136, since being at risk for layoff (due to a low ranking relative to other employees) and actually being selected for layoff are two quite different things.

[**44]

Kodak emphasizes the fact that Thomas refused to sign two of the three performance appraisals. According to Kodak, her refusal to sign "demonstrates that she was dissatisfied with [the appraisals] for some reason" and makes it "evident that she then believed she had been treated unfairly." Appellee's Brief at 18 n.6. A trier of fact could, but need not necessarily, conclude that Thomas had notice of the appraisals' possible racial bias as soon as they were presented to her. However, this fact does not go to the relevant question under *Johnson's* notice rule: whether Thomas had notice of immediate, tangible consequences of her poor scores. [**45] Kodak's argument pertains to notice of bias rather than the notice of harm required under *Johnson*. But notice of bias alone, absent harm, is clearly not sufficient under *Johnson*.[11]

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[10] The compensation plan instructed appraisers not to discuss appraisals in comparative terms, and appraisal scores were not openly discussed among employees. Thus, Thomas had no way to discover this information on her own. Although she knew that her scores were low in comparison to the scores she had received before Flannery became her supervisor, she could not know that they were low in comparison to the scores of other CSRs whom Flannery was evaluating.

[11] Our analysis of the notice-of-harm issue might be different in the context of a hostile environment claim. In that context, we

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We hold that the performance appraisals Thomas received in 1990, 1991, and 1992 did not trigger the statute of limitations in § 2000e-5(e)(1) at the time they were presented to Thomas, because they did not initially have any crystallized implications or apparent tangible effects. The notice of the layoff is the date on which the limitations period began to run because Thomas's low appraisal scores first resulted in concrete injury in 1993 when they led to her layoff. Since Thomas filed a charge with the EEOC within one hundred and eighty days of her layoff (the shortest possible period imposed under § 2000e-5(e)(1)), her claim is timely.

[*56] **B**

The second question on appeal is whether a reasonable jury could find, based on Thomas's evidence, that Flannery discriminated against Thomas because of her race when she assigned Thomas's performance appraisal scores. *See* 42

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might find that Thomas's low appraisal scores caused some tangible harm as soon as they were presented to her, since Thomas reportedly found the low scores to be "insulting" and "shameful" (and demonstrated this by refusing to sign them). But pinpointing the moment of accrual for a hostile environment claim is a different problem altogether than the one here, since a certain accumulation of discriminatory events or situations is necessary before an employee is expected -- or permitted -- to bring a hostile environment suit. *See Provencher v. CVS Pharmacy*, 145 F.3d 5, 14-15 (1st Cir. 1998) (noting that in some circumstances a plaintiff may be "unable to appreciate that he is being discriminated against until he has lived through a series of acts and is thereby able to perceive the overall discriminatory pattern" (internal quotation marks omitted)).

U.S.C. § 2000e-2(a)(1). To reach an answer, we follow the three stages of the "familiar burden-shifting framework," *Mulero-Rodriguez v. Ponte, Inc.*, 98 F.3d 670, 673 (1st Cir. 1996), that was first outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), [**47] and further explained in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). The three stages can be summarized as follows:

> First, the plaintiff[] must establish a prima facie case that [plaintiff] (1) was within a protected class; (2) met [the employer's] legitimate performance expectations; (3) was adversely affected; and (4) was replaced by another with similar skills and qualifications. Once [plaintiff] do[es] so, the burden shifts to [the employer] to produce a valid and nondiscriminatory reason for the dismissal. In the final stage, the burden shifts back to the plaintiff[] to show that [the employer's] stated reason for [plaintiff's] dismissal was false and but a pretext for discrimination.

Mulero-Rodriguez, 98 F.3d at 673 (citations omitted).

We focus particularly on the final stage of the *McDonnell Douglas/Burdine* framework, because we agree with the district court's careful analysis of the first two stages. *See Thomas*, 18 F. Supp. 2d at 135. Thomas has established a prima facie case of discrimination by showing that she is a member [**48] of a protected class who met Kodak's legitimate performance expectations and was laid off, while Kodak retained persons outside the protected class. *See id.* This created a presumption that Kodak unlawfully discriminated against her. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 125 L. Ed. 2d 407, 113 S. Ct.

2742 (1993) (citing *Burdine*, 450 U.S. at 254). To counter this presumption, Kodak must "articulate some legitimate, nondiscriminatory reason" for its action, *McDonnell Douglas*, 411 U.S. at 802, that is, allege "reasons for its action which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action," *Hicks*, 509 U.S. at 507 (citing *Burdine*, 450 U.S. at 254-55). At this second stage, the framework imposes on the defendant only a burden of production. The burden of persuasion remains at all times with the plaintiff. *See* 509 U.S. at 508 (citing *Burdine*, 450 U.S. at 256). Kodak met its burden of production -- and eliminated the presumption that it had discriminated -- by contending that [**49] its layoff decision was based solely on racially neutral performance appraisal scores. *See Thomas*, 18 F. Supp. 2d at 135.

At the third stage of the *McDonnell Douglas/Burdine* framework, the ultimate burden is on the plaintiff to persuade the trier of fact that she has been treated differently because of her race. *See Hidalgo*, 120 F.3d at 335. This burden is often broken into two separate tasks. The plaintiff must present sufficient evidence to show both that "the employer's articulated reason for laying off the plaintiff is a pretext" and that "the true reason is discriminatory." *Udo v. Tomes*, 54 F.3d 9, 13 (1st Cir. 1995) (citing *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994)). For expository convenience, this court has sometimes labeled these two findings "pretext" and "plus" and has referred to the First Circuit rule as a "pretext-plus" standard. *See, e.g., Mullin v. Raytheon Co.*, 164 F.3d 696, 699 (1st Cir. 1999) (describing the difference between the "federal 'pretext-plus' standard and the Massachusetts 'pretext-only' standard"); *Dichner v. Liberty Travel*, [*57] 141 F.3d 24, 30 (1st Cir. 1998) [**50] (describing the "'pretext plus' approach").

Applying this standard, the district court found that Thomas had met the first part of her burden. It determined that a jury could find that the appraisal scores were objectively unfair or in some sense skewed against Thomas. Accordingly, the court found that "[b]ased only on the evidence presented so far, a reasonable fact finder could determine that Flannery's reasons for lowering plaintiff's [performance appraisal] ratings were pretextual." *Thomas*, 18 F. Supp. 2d at 137. As explained below, we agree.

But the court also found that Thomas did not meet the second, "plus" part of her burden: she failed to present evidence to create a genuine issue of fact about whether the allegedly unfair scores were due to her race and not some other factor. *See id.* at 137-38. The court compared the evidence presented by Thomas, which in the court's view amounted only to evidence of "an unwelcoming office environment," "conspicuously unfair treatment" by Flannery, and "a personality conflict between Flannery and plaintiff," *id.*, with the evidence presented by plaintiffs in other First Circuit cases in which plaintiffs [**51] had survived summary judgment:

> In all of these cases, the plaintiff alleged at least one piece of evidence that explicitly referred to plaintiff's membership in a protected class, and stated or implied that this membership was or would soon adversely affect plaintiff's employment prospects. By contrast, in cases where plaintiff fails to make any connection between adverse employment actions and membership in a protected class, summary judgment is granted to the employer, and judgment is affirmed.

Id. at 138. The court granted summary judgment to Kodak because it found that Thomas had failed to "make any

connection" between Flannery's actions and her own membership in a protected class. *Id.* In particular, the court found that Thomas failed to present any evidence that Flannery had *expressly* linked the low scores to Thomas's race and that Thomas's evidence of pretext was not "*flagrant*" enough to support a finding of discrimination on its own. *Id.* (emphasis added).

The district court's analysis mischaracterizes the plaintiff's burden at the third stage of the *McDonnell Douglas/Burdine* framework. To clarify the actual nature of [**52] that burden, we make a number of points.

First, the labels "pretext" and "plus" must be used with great care. Although it uses the label "plus," the First Circuit's "pretext-plus" standard "does not necessarily require the introduction of additional evidence" beyond that required to show "pretext," i.e., evidence showing that the employer's articulated reason is false. *Dichner*, 141 F.3d at 30. Plaintiffs may use the same evidence to support both conclusions, "provided that the evidence is adequate to enable a rational factfinder reasonably to infer that unlawful discrimination was a determinative factor in the adverse employment action." *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 1999 U.S. App. LEXIS 13236, 1999 WL 373525, at *7 n.5 (1st Cir. 1999); *see also Udo*, 54 F.3d at 13.

A corollary is that there can be no mechanical formula at the third stage of the *McDonnell Douglas/Burdine* framework. "The strength of the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances. In short, everything depends on the individual facts." *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 n.3 (1st Cir. 1994). [**53] Other circuits have highlighted the same point: "The sufficiency of the finding of

pretext to support a finding of discrimination depends on the circumstances of the case." *Fisher v. Vassar College*, 114 F.3d 1332, 1338 (2d Cir. 1997). Moreover, "it is difficult, if not impossible, to say in any concise or generic way under what precise circumstances . . . an inference [of discrimination from a showing of pretext] will be inappropriate." *Aka v. Washington Hosp. Ctr.*, 332 U.S. App. D.C. 256, 156 F.3d 1284, [*58] 1294 (D.C. Cir. 1998). Because discrimination, and discrimination cases, come in many different forms, a case-by-case analysis is always necessary. There can be no rigid requirement that plaintiffs introduce a separate "plus" factor, such as a negative employer comment about the plaintiff's protected class, in order to prove discrimination. Otherwise, the *McDonnell Douglas/Burdine* framework would no longer serve the purpose for which it was designed: allowing plaintiffs to prove discrimination by circumstantial evidence.[12] *See Smith v. F.W. Morse & Co.*, 76 F.3d 413, 420-21 (1st Cir. 1996).

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Our second point is related. That "everything depends on the individual facts" means we need to look carefully at the particular type of claim that Thomas is bringing. As we understand Thomas's argument, she alleges a more subtle type of disparate treatment than the type often used to exemplify the operation of the *McDonnell Douglas/Burdine*

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[12] This method of proving a Title VII claim is all the more important now than it was when *McDonnell Douglas* was written, since "smoking gun" evidence is "rarely found in today's sophisticated employment world." *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 171 n.8 (1st Cir. 1998).

framework. She does not argue that Kodak has articulated a false reason for her layoff (for example, excessive tardiness) in order to disguise the actual, unrelated reason (her race) -- what one might describe as a "truth versus lies" claim -- rather, she challenges the racial neutrality of the proffered reason itself. The latter type of challenge is also cognizable as a form of disparate treatment: if an employer evaluates employees of one race less favorably than employees of another race who have performed equivalently, and if race, rather than some other factor, is the basis for the difference in evaluations, then the disfavored employees have been subjected to "discrimina[tion] . . . because of . . . race." § 2000e-2(a)(1).

The "pretext-plus" label may seem inapposite for this type of claim, since the word "pretext" could suggest a [**55] conscious lie. But issues of pretext should not be confused with the issue of whether there has been discrimination "because of race." As the Supreme Court has used the term "pretext," the term provides "no justification for assuming . . . that those employers whose evidence is disbelieved are perjurers and liars." *Hicks*, 509 U.S. at 520. According to the *Hicks* Court, "[t]o say that the company which in good faith introduces such testimony, or even the testifying employee himself, becomes a liar and a perjurer when the testimony is not believed, is nothing short of absurd." *Id.* at 520-21. The ultimate question is whether the employee has been treated disparately "because of race." This is so regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias. *See Robinson v. Polaroid Corp.*, 732 F.2d 1010, 1015 (1st Cir. 1984) (noting that plaintiffs in a disparate treatment case can challenge "subjective evaluations which could easily mask covert or unconscious race discrimination on the part of predominantly white

managers"); *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169, 179 [**56] (1st Cir.) (permitting a challenge to a decision process in which "bias may often be unconscious and unexpressed"), *vacated on other grounds*, 439 U.S. 24, 24 (1978), *aff'd after remand*, 604 F.2d 106, 114 (1st Cir. 1979) (noting again that sex discrimination includes "the practice, whether conscious or unconscious, of subjecting women to higher standards of evaluation than are applied to their male counterparts").[13]

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[*59] The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus. Indeed, discussing age discrimination in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 123 L. Ed. 2d 338, 113 S. Ct. 1701

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[13] The language in certain other First Circuit cases might suggest that an express and conscious employer intent to discriminate is critical to the third stage of the *McDonnell Douglas/Burdine* inquiry. Cases have stated, for example, that a plaintiff must "elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real motive," *Hidalgo*, 120 F.3d at 335 (internal quotation marks omitted), or that in evaluating the evidence for pretext, "we remember that the issue is not whether [the employer's] reasons to fire [plaintiff] were real, but merely whether the decisionmakers . . . believed them to be real," *Mulero-Rodriguez*, 98 F.3d at 674. But these cases turn on the particular theories advanced by the plaintiffs therein. *See, e.g., Hidalgo*, 120 F.3d at 335 (considering whether a division was shut down for lack of profits or to eliminate an older employee); *Mulero-Rodriguez*, 98 F.3d at 674-75 (examining whether an employer fired plaintiff because of his alleged failure to maintain inventory levels or because of his age and national origin).

(1993), the Court characterized employer decisions "'based in large part on stereotypes unsupported by objective fact,'" *id.* at 610-11 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983)), as "the *essence* of what Congress sought to prohibit in the ADEA," 507 U.S. at 610 (emphasis added). And the prohibition against this form of disparate treatment is not limited to the context of age discrimination. The Court has interpreted Title VII as "'prohibit[ing] all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin,'" *County of Washington v. Gunther*, 452 U.S. 161, 180, 68 L. Ed. 2d 751, 101 S. Ct. 2242 (1981) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763, 47 L. Ed. 2d 444, 96 S. Ct. 1251 (1976)), [**58] and has noted that this includes "the entire spectrum of disparate treatment of men and women resulting from sex stereotypes," *id.* (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13, 55 L. Ed. 2d 657, 98 S. Ct. 1370 (1978)). Stereotypes or cognitive biases based on race are as incompatible with Title VII's mandate as stereotypes based on age or sex; here too, "the entire spectrum of disparate treatment" is prohibited.

The role of such stereotyping has been discussed most thoroughly in that branch of disparate treatment law developed apart from the *McDonnell Douglas/Burdine* framework and known as the *Price Waterhouse* framework. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-58, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989); *Smith*, 76 F.3d at 420-22 (comparing the two frameworks). The district court in *Price Waterhouse* found that the employer, an accounting firm, had discriminated against Ann Hopkins by permitting stereotypical attitudes about women to play a role in its decision not to invite her to become partner. *See Hopkins v.*

Price Waterhouse, 618 F. Supp. 1109, 1118-19 (D.D.C. 1985). [**59] On appeal, the employer contended that it could not be liable for disparate treatment because "Hopkins did not prove 'intentional' discrimination on the part of the [decision-making] Board, but only 'unconscious' sexual stereotyping by unidentified partners who participated in the selection process." *Hopkins v. Price Waterhouse*, 263 U.S. App. D.C. 321, 825 F.2d 458, 468 (D.C. Cir. 1987), *aff'g in part and rev'g in part Hopkins*, 618 F. Supp. at 1113-21. The D.C. Circuit squarely rejected this argument:

> In keeping with [Title VII's remedial] purpose, the Supreme Court has never applied the concept of intent so as to excuse an artificial, gender-based employment barrier simply because the employer involved did not harbor the requisite degree of ill-will towards the person in question. As the evidentiary framework established in *McDonnell Douglas* makes clear, the requirement[] of discriminatory motive in disparate treatment cases does not function as a "state of mind" element, but as a method of ensuring that only those arbitrary or artificial employment barriers that are related to an employee or applicant's [*60] race, sex, religion, [**60] or national origin are eliminated.

825 F.2d at 468-69 (footnotes omitted); *see also Lynn v. Regents of the Univ. of Cal.*, 656 F.2d 1337, 1343 n.5 (9th Cir. 1981) ("When plaintiffs establish that decisions regarding . . . employment are motivated by discriminatory attitudes relating to race or sex, or are rooted in concepts which reflect such attitudes, however subtly, courts are obligated to afford the relief provided by Title VII.").

The court of appeals found it unsurprising that the disparate treatment doctrine focuses on causality rather than

conscious motivations, since "unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination." *Hopkins*, 825 F.2d at 469. If the plaintiff has shown that she was treated less favorably because of her gender, the court said, "the fact that some or all of the partners at Price Waterhouse may have been unaware of that motivation, even within themselves, neither alters the fact of its existence nor excuses it." *Id.*

The Supreme Court upheld this portion of the D.C. Circuit's decision. *See Price Waterhouse*, 490 U.S. at 250-52 [**61] (plurality opinion); *id.* at 259 (White, J., concurring in the judgment); *id.* at 261, 272, 277-78 (O'Connor, J., concurring in the judgment); *see also Hopkins v. Price Waterhouse*, 287 U.S. App. D.C. 173, 920 F.2d 967, 969 (D.C. Cir. 1990) (affirming district court decision after remand from Supreme Court) (noting that this portion of *Hopkins*, 825 F.2d at 468-69, was upheld by the Supreme Court). The *Price Waterhouse* plurality explained: "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Price Waterhouse*, 490 U.S. at 249. The plurality added that "[b]y focusing on [the plaintiff's] specific proof, . . . we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision." *Id.* at 251-52.[14]

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[14] *Price Waterhouse* also held that an employer could avoid liability for disparate treatment if it could demonstrate that it would have taken the same action in the absence of the discriminatory motive. *See Price Waterhouse*, 490 U.S. at 237-52 (plurality opinion). This holding was statutorily overruled by the 1991 Civil Rights Act. *See* Civil Rights Act of 1991 § 107, 42 U.S.C. § 2000e-2(m) ("[A]n unlawful employment practice is established

when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."). The 1991 Civil Rights Act did not overrule *Price Waterhouse's* application of Title VII to employer decisions based on stereotypical thinking.

In defining those violations of Title VII for which compensatory damages may be awarded, the 1991 Act uses the phrase "unlawful intentional discrimination." 42 U.S.C. § 1981a(a)(1). This phrase merely distinguishes the disparate treatment framework, and other frameworks in which plaintiffs are individually affected, from the disparate impact framework. *See id.* (limiting compensatory damages to actions in which respondents "engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact)"). Cases decided after the enactment of the 1991 Civil Rights Act continue to recognize the validity of claims based on employers' biased or stereotypical thinking. *See, e.g., Galdieri-Ambrosini v. National Realty & Dev. Corp.*, 136 F.3d 276, 289 (2d Cir. 1998) (upholding judgment for employer as a matter of law, given insufficient evidence of discrimination, but noting, in case where plaintiff sought compensatory damages, that "[e]vidence of sexual stereotyping may provide proof that an employment decision . . . was based on gender"); *Bush v. Commonwealth Edison Co.*, 990 F.2d 928, 931-32 (7th Cir. 1993) (considering whether plaintiff has produced evidence adequate to show that the employer's subjective determinations "reflect[ed] unconscious racial bias"); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 864 (D. Minn. 1993) (noting that under *Price Waterhouse* expert testimony regarding sexual stereotyping can be relevant to plaintiff's disparate treatment claim). While the Supreme Court recently considered the mental state necessary for the award of punitive damages under the 1991 Civil Rights Act, *see Kolstad v. American Dental Ass'n*, 144 L. Ed. 2d 494, 119 S. Ct. 2118, 1999 WL 407481 at *5-8 (1999) (interpreting 42 U.S.C. § 1981a(b)(1), which permits punitive

[**62] [*61] The concept of "stereotyping" includes not only simple beliefs such as "women are not aggressive" but also a host of more subtle cognitive phenomena which can skew perceptions and judgments. *Price Waterhouse* highlighted one such phenomenon: the tendency of "unique" employees (that is, single employees belonging to a protected class, such as a single female or a single minority in the pool of employees) to be evaluated more harshly in a subjective evaluation process. *See* 490 U.S. at 235-36; *see also Villanueva v. Wellesley College*, 930 F.2d 124, 131 (1st Cir. 1991) (discussing possible relevance of plaintiff's status as the sole employee within a protected class). Other types of biased thinking are also widely recognized. *See generally* L. H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1186-1217 (1995) (describing varieties of cognitive bias); C. R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 328-44 (1987) (discussing forms of racism); [**63] *see also* D. Charny & G. M. Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination for "High-Level" Jobs*, 33 Harv. C.R.-C.L. L. Rev. 57, 77-78, 83 (1998) (noting the inability of the market alone to correct the effects of cognitive biases and stereotypes).

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damages where an employer has acted "with malice or with reckless indifference to [the employee's] federally protected rights"), it has not reconsidered *Price Waterhouse's* conclusion that the phrase "because of" in § 2000e-2(a)(1) is not limited to expressly conscious intent.

We make one final general point about the third stage of the *McDonnell Douglas/Burdine* framework: in the context of a motion for summary judgment, courts must be very cautious about sua sponte finding non-discriminatory reasons for apparently disparate treatment. Although the presumption of discrimination has dropped out of the case by the third stage of the *McDonnell Douglas/Burdine* framework, its rationale remains relevant: discrimination, rarely explicit and thus rarely the subject of direct evidence, may be proven through the elimination of other plausible non-discriminatory reasons until the most plausible reason remaining is discrimination. *See Burdine*, 450 U.S. at 254 n.8 (noting that "the allocation of burdens" in a Title VII case "is intended progressively to sharpen the inquiry into the elusive factual question of intentional [**64] discrimination"). In this case, for instance, the plaintiff has argued that her appraisal scores were unfairly low because of her race, while the defendant has argued that the scores were objectively fair. By finding that plaintiff has presented enough evidence to suggest that her scores were unfairly low, and then speculating that a personality conflict could be the source of that unfairness, the district court erroneously adopted a third view. *See Thomas*, 18 F. Supp. 2d at 137-38. No party in this case has argued that a personality conflict explained any disparity in the scores assigned by Flannery, and the district court should not, at summary judgment, have replaced Kodak's articulated explanation sua sponte with its own. It may be that a jury (or judge, if no jury trial is claimed) would find at trial that a personality conflict rather than racial bias is the best explanation for any difference in scores. But the question at summary judgment is not which of the possible explanations is most convincing; it is whether the plaintiff has produced enough evidence to raise a genuine issue of fact regarding *her* explanation.

Having clarified the actual nature of [**65] the plaintiff's burden under *McDonnell Douglas/Burdine*, we now consider whether Thomas has met that burden. Because the employer here has articulated a non-discriminatory reason for its action, the initial presumption of discrimination created [*62] under *McDonnell Douglas/Burdine* has dropped from the case. *See Hicks*, 509 U.S. at 510-11; *Smith*, 76 F.3d at 421. This leaves the plaintiff with the ultimate burden of proving discrimination. She must produce evidence to create a genuine issue of fact with respect to two points: whether the employer's articulated reason for its adverse action was a pretext and whether the real reason was race discrimination. *See Udo*, 54 F.3d at 13. In other words, she must produce evidence to permit a reasonable jury to conclude both that disparate treatment occurred and that the difference in treatment was because of race. The same evidence may support both showings. *See id.*

The first portion of Thomas's third-stage burden is to produce sufficient evidence to show that she was not evaluated on the same terms as her colleagues, but rather was evaluated more harshly than the other, [**66] non-minority CSRs. The district court found that the plaintiff met this portion of her burden: she produced enough evidence to allow a reasonable factfinder to determine that Flannery's reasons for assigning her scores were "pretextual." *Thomas*, 18 F. Supp. 2d at 137. We agree.

One strong piece of evidence is the sharp drop in Thomas's overall score (from 6 in 1989 to 3 in 1990) after Flannery became her supervisor. While the drop in score would not demonstrate uneven treatment if Flannery were simply a "tough grader," this does not appear to have been the case. In 1990, when Thomas received a 3, all of the other

CSRs whom Flannery graded received either a 5 or a 6.[15] Furthermore, over her three years as supervisor Flannery gave CSRs other than Thomas a number of 7s in individual categories, a score that earlier supervisors characterized as extremely rare or even unheard of.

[**67]

The drop in Thomas's score from 1989 to 1990 would also fail to demonstrate uneven treatment if it merely reflected a higher standard imposed upon Thomas due to her grade change in 1989. According to Kodak, "the higher the wage grade and salary, the more Kodak expected from the employee." Appellee's Brief at 34. But Thomas presents deposition testimony from other supervisors suggesting that there was no such rule, and the scores that Flannery assigned to other Wellesley CSRs seem to bear this out: one CSR who received a grade change in 1991 received a 5 in 1992 after receiving a 6 in 1991 (a drop of only one point rather than

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[15] This information comes from a summary chart of performance appraisal scores produced by Kodak. For 1990 Kodak apparently retained only Thomas's appraisal form and the overall scores of the other CSRs; it was unable to produce the other five appraisal forms for 1990. Thomas suggests in a footnote that the summary chart "would be inadmissible pursuant to FRE 1006 since the documents summarized are not so voluminous that a jury could not reasonably review them at trial and because the documents summarized were not produced." Appellant's Brief at 18 n.3. We do not address this argument, since issues not squarely raised by the parties are considered waived. *See Service Employees Int'l Union v. Local 1199 N.E.*, 70 F.3d 647, 654 n.7 (1st Cir. 1995) (noting that a "cursory footnote" does not suffice to raise an issue (internal quotation marks omitted)). In any event, both Kodak and Thomas rely on the information contained in the chart.

three after the grade change), and another CSR who received a grade change in 1991 received a *higher* score the following year (from a 4 in 1991 to a 5 in 1992).

Thomas makes other specific comparisons as well. The strongest of these concern her scores for "quantity of results," which was the most objective of the categories appraised, since it was based directly on the number of machines and installations for which a CSR was responsible. Thomas's scores appear low when compared to the scores for quantity given to other CSRs. In 1990, for instance, Thomas [**68] received only a 3 for quantity of results -- a below average score -- for managing 730 machines and 110 installations, while another CSR, also in the K6 grade, received [*63] a 5 for quantity in 1991 for managing far fewer machines (504) and fewer installations (81). Kodak argues that the comparison is "unfair and analytically unsound" because the other employee had been at the K6 grade for many years, and "sustained performance at a higher grade counts for more than a relatively shorter period of performance at the higher grade." Appellee's Brief at 35. This argument might persuade a jury to discount the value of this comparison, but it does not render the comparison meaningless at summary judgment, where Thomas need only produce evidence sufficient to support her contention that her scores were lower than those given to similarly performing non-minority CSRs. *See Molloy v. Blanchard*, 115 F.3d 86, 91 (1st Cir. 1997) (noting that "'[e]xact correlation is neither likely nor necessary'" and stating that "'[t]he test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent.'" (quoting *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 19 (1st Cir. 1989))). [**69]

In addition to the performance appraisals themselves, Thomas presents other evidence to show that Flannery treated

her differently than she treated the other CSRs. According to Thomas, Flannery used flimsy grounds to prevent her from delivering an important presentation at a Kodak meeting, refused to provide her with computer training, failed to allow her appropriate developmental opportunities, and failed to evaluate her accurately on the basis of her interaction with customers (since she never accompanied Thomas on site in order to observe that interaction, as she did with the other CSRs).

On the whole Thomas has presented enough evidence to survive summary judgment on the question of disparate treatment. Some of Thomas's scores, and particularly the 1990 scores, appear lower than one would expect given her apparent performance level. A reasonable jury, examining the evidence Thomas has submitted, could conclude that Thomas was evaluated more harshly than other, non-minority CSRs supervised by Flannery.

Kodak argues that, even if true, this would not matter, because Thomas would have been laid off anyway. Even if Thomas had received the highest possible score (7) in 1990, Kodak [**70] says, her PAR ranking would not have changed: because the PAR formula so heavily weighted the two more recent scores, Thomas would still have had the second lowest PAR score among the CSRs and would still have been selected for layoff. There are two flaws with this argument. First, it ignores the natural implications of a finding that the 1990 scores were unfairly low. To the extent that Thomas's 1990 scores were inappropriately low, a

factfinder could infer that her later scores -- although higher than her 1990 scores -- were inappropriately low as well[16] (and indeed, they were consistently lower than the scores given to the other CSRs, as demonstrated by the performance appraisals that Kodak has produced for 1991 and 1992). Second, Kodak's argument ignores the fact that performance appraisal scores were expressly on a curve. According to Kodak's compensation plan, scores were to be "validated" by reference to an informal supervisor ranking of employees in the group. Thus, if Thomas's scores had gone up, other CSRs' scores might have gone down. Whether accurate scoring of Thomas in relation to the other CSRs would have saved her from layoff is something Thomas must prove at trial. [**71] But she has created a genuine issue with respect to this question. Not only has she produced evidence which suggests that Flannery treated her differently and graded her more harshly than the other CSRs, she has also produced evidence to support the claim that her earlier evaluations were a more accurate [*64] appraisal of her performance: (1) her promotion in 1989 to the K6 grade, which was reserved for "outstanding" CSRs "servicing the largest and/or most sensitive accounts," (2) her salary, which was higher than her seniority would predict, presumably reflecting the fact that Kodak had, over the years, found her performance level to be comparatively high, and (3) the positive comments from customers and from other supervisors, which suggest that she was in fact one of the better CSRs.

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[16] In addition to drawing such an inference, a factfinder might also reach this conclusion -- that Thomas's 1991 and 1992 scores were inappropriately low -- by relying on the type of direct evidence discussed above with reference to Thomas's 1990 scores.

Our inquiry does not end with this finding, since even the most blatant unfairness cannot, on its own, support a Title VII claim. "Title VII does not grant relief to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless facts and circumstances indicate that discriminatory animus was the reason for the decision." *Smith*, 40 F.3d at 16; *see also Rodriguez-Cuervos*, 1999 WL 373525, at * 5. Instead, our focus shifts to the question whether Thomas has produced sufficient evidence to support a finding that the apparent disparity in treatment was due to her race.

As we emphasized above, Thomas can meet her burden with respect to this question using the same evidence used to show unequal treatment. The district court's opinion can be read to say that at this stage the plaintiff must produce what has been called "direct" evidence, such as racially explicit statements. That is not so. There is no requirement that a plaintiff, having shown differential treatment and pretext, must present direct, "smoking gun" evidence of racially biased decisionmaking in order to prevail. Where the disparity in treatment is striking enough, [**73] a jury may infer that race was the cause, especially if no explanation is offered other than the reason rejected as pretextual. That is the case here, since Kodak argues that Thomas's scores were objectively fair, not that they were unfair due to a personality conflict, as the district court surmised.

In fact, Thomas does present additional evidence on this point. She describes incidents and situations which suggest that Flannery had a general disregard for her professional abilities and status. It also appears, from the picture that Thomas paints (and which Kodak does not dispute) that Flannery was at times inappropriately upset or angry with Thomas, to the point of behaving unprofessionally. This, in

turn, suggests that she did not respond neutrally to Thomas. A jury might reasonably infer from Thomas's description of these incidents that Thomas's race was an issue for Flannery and that Flannery's evaluations of Thomas were affected by some form of conscious animus or less conscious bias.[17]

[**74]

Our assessment of the evidence would be quite different if Thomas had been one of several black employees supervised by Flannery, some of whose scores were not low relative to those of the non-minority CSRs. But that was not the case. Thomas was the only black CSR, and one can infer from the evidence that she was also the only CSR who was evaluated unfairly. [*65] Given this, it is reasonable to infer that race played a determinative role in the evaluation process

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[17] Thomas describes a number of other incidents from her time at Kodak, not involving Flannery, which she believes to have been racially tinged. (These incidents are recounted in note 4 above.) If true, these incidents are unfortunate, but they are not relevant to the issue whether Flannery evaluated Thomas differently because of her race. As a general matter, "the biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case." *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 10 (1st Cir. 1990). Although "circumstantial evidence of a general discriminatory environment may add 'color' to an employer's decisionmaking process, we have explained that '[p]roof of a general atmosphere of discrimination is not the equivalent of proof of discrimination against an individual.'" *Ruiz v. Posadas de San Juan Assocs.*, 124 F.3d 243, 249 (1st Cir. 1997) (quoting *Sweeney*, 604 F.2d 106 at 113). Because the incidents that Thomas describes appear to have been isolated in time and limited in number, and because these incidents did not appear to involve individuals in a position of influence over Flannery, we do not take them into account.

-- especially since there is also other evidence that Flannery treated Thomas poorly. Indeed, the very fact that Thomas was the only black CSR at the Wellesley office may have increased the likelihood that she would be evaluated more harshly. *See Price Waterhouse*, 490 U.S. at 235-36; *Villanueva*, 930 F.2d at 131.

In the end, Thomas is in a different position than a plaintiff who merely "disagree[s] with [the employer's] assessment of her relative performance." *Compton v. GTE Gov't Sys., Corp.*, 1995 U.S. Dist. LEXIS 20040, No. 93-11383, 1995 WL 791938, at * 6 (D. Mass. Dec. 7, 1995), *cited in Thomas*, 18 F. Supp. 2d at 136; *see also Blick v. Pitney Bowes Management Servs., Inc.*, 1995 U.S. Dist. LEXIS 20005, [**75] No. 93-11573, 1995 WL 791945, at * 5 (D. Mass. Dec. 25, 1995) (noting that a plaintiff's mere disagreement with the employer's "assessment of his work attitude . . . is not sufficient to create a triable federal discrimination claim"), *cited in Thomas*, 18 F. Supp. 2d at 136. Thomas has presented "evidence from which the trier of fact reasonably could conclude that [her] abilities and qualifications were equal or superior to employees who were retained." *Goldman v. First Nat'l Bank of Boston*, 985 F.2d 1113, 1119 (1st Cir. 1993). It is not an "improbable inference[]" or "unsupported speculation," *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990), to further conclude, based on the evidence available at summary judgment, that Kodak failed to recognize this fact because it relied on an evaluation procedure that was tainted by racial bias.

IV

Thomas's claim is timely, and it is based on sufficient evidence to permit a reasonable jury to find that Flannery

discriminated against Thomas because of her race when she assigned the performance appraisal scores that led to Thomas's layoff. Accordingly, [**76] we reverse the district court's grant of summary judgment and remand for further proceedings consistent with this opinion.

Costs are awarded to appellant.